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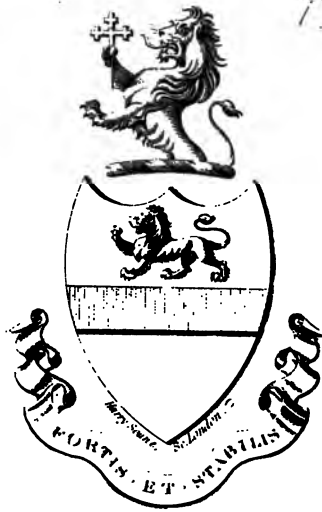
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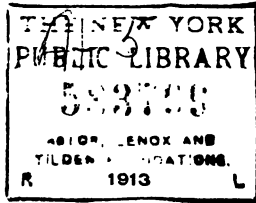
EDITED BY
GEORGE ATKINSON, SERJEANT-AT-LAW,
AUTHOR OF "INTERNATIONAL LAW," "THE SHERIFF LAW," ETC.

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TO THE RIGHT HON^{BLE}.

- SIR JOHN JERVIS, K^{NT}.

LORD CHIEF JUSTICE OF HER MAJESTY'S

COURT OF COMMON PLEAS,

THESE PRESENTS COME

Greeting.

THESE PRESENTS COME
FROM THE
SIR JOHN JERVIS
K^{NT}

22

MOY VON
ZUR
VAADEL

1, INNER TEMPLE LANE.
April 25th, 1854.

MY LORD,

Many years ago I resolved that I would, if spared, attempt to restore "Park on Marine Insurance," and "Abbott on Shipping," to their original simplicity and design. The result of this resolve is now before you, under one cover and under one title, namely, "The Shipping Laws of the British Empire."

To effect this, I chose an early edition of each work; which, as you know, were small 8vos sold at a few shillings, and so simple that he who ran could read them.

I have religiously kept them, as they originally were, works on general principles; being well persuaded of this, that whoever attempts to make a law-book serve at once the threefold purpose of a treatise on general principles, statutes at large, and law reports, must fail to make it good for anything. Do not misunderstand me in saying so. I have omitted no Act of Parliament, nor any reported case that I know of. I have done this—where either the one or the other interfered with the original text, there I have introduced it—not *in extenso* (a system no less derogatory to learning than injurious to the utility of a book) but analysed, abridged, and incorporated with the text.

The way in which I have introduced the different Acts of Parliament is exemplified by the Pilot Acts (6 Geo. 4, c. 125; 16 and 17 Vict., c. 129); the Mercantile Marine Act 1850 (13 and 14 Vict., c. 93); the Mercantile Marine Act Amendment Act (14 and 15 Vict., c. 96); the Steam Navigation Act 1851 (14 and 15 Vict., c. 79); the Passengers Act 1852 (15 and 16 Vict., c. 44); the Customs Consolidation Act 1853 (16 and 17 Vict., c. 107); the Consolidation Register Act (8 and 9 Vict., c. 89); the Navigation Acts (12 and 13 Vict. c. 29, and 16 and 17 Vict., c. 131); the Wreck and Salvage Consolidation Act (9 and 10 Vict., c. 99); and the like. There is, at this moment, a Bill before Parliament for throwing open to the foreigner our *Coasting Trade*; but as it has not yet received the Royal assent I cannot treat it as part of the law of the land. The way in which a judicial decision is introduced is exemplified by the case of *Irving v. Manning* in the first page of the work.

I have drawn largely upon the learning and industry found in the reports in the Admiralty Courts and in the Privy Council—upon arguments and judgments equal to, if not surpassing, in excellence, those in the time of the great Lord Stowell. I have not overlooked foreign codes and ordinances. The ordinances of Louis XIV., although no longer the law of France, are so frequently referred to and quoted by Lord Tenterden, that I could not strike them out and substitute the *Code de Commerce*; I have, therefore, left them as they were;

and, to prevent mistake, have referred to the *Code de Commerce* and *Code Civil* in the notes below.

There are two subjects twice treated of, namely, *average* and *salvage*; each author having a chapter upon those subjects. This is a repetition (the unavoidable result of uniting the two books under one cover), but as they are considered from a different point of view, the one with a view to *insurance* and the other to *shipping* generally, and as they consequently reflect light upon each other, to strike one or other out would not only have done violence to the authors of it, but deprived the practitioner of the reflected light which is so valuable in the science and practice of the law.

To bring these two standard works once more within the reach of ordinary understandings, and within the means of ordinary men, I have done some violence to them both. I have, for instance, struck out from *Park* that part which relates to *Fire Insurance*; my object being to confine it to *Marine Insurance*. Let me, however, express a hope that both lawyer and merchant will consider this amply compensated for by the introduction of the chapters on *Steam Navigation*, the *Passengers Act*, and the like.

I have not, as I first began to do, distinguished my own matter from the authors' by any sign or mark: I have done this entirely out of deference to the opinion of professional brethren to whose great experience and sound judgment I always defer.

The *declaration of war* against *Russia* with Proclamations and Orders in Council relating to the matter are added.

If, for this attempt to rescue from wreck these two standard works, my countrymen should think I deserve any salvage-remuneration, I wish now to make it known, that the *Merchant Seamen's Fund* (one of the wisest and most humane of modern Institutions) receives Voluntary Contributions: and, as regards myself, that I am abundantly remunerated by the assurance that I have earned it.

I ought not to allow this book to appear without publicly expressing my gratitude to *Simeon Jacobs, Esq.*, of the *Home Circuit*, for the invaluable service rendered to me while it was in the press.

I am, My Lord,

Your Lordship's Obedt. Servt.,

GEORGE ATKINSON.

To the Right Hon^{ble}.
SIR JOHN JERVIS, KNT.

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SIR JAMES ALLAN PARK'S INTRODUCTION.*

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WHEN we consider the wonderful effects which commerce has produced on the manners of men, when we observe that it tends to wear off those prejudices which give birth to dissensions and animosities, that it unites mankind by the strongest of all ties, the desire of supplying mutual wants ; and that it disposes them to peace and concord, by establishing in every community an order of men whose interest it is to preserve public tranquillity, we are led to think that the history and progress of it would not only be amusing, but highly important and instructive to the inhabitants of every civilised society. Such a work would be in fact the history of the intercourse and communication of mankind, and must necessarily abound in events the most interesting to every social being, but particularly so to the people of this country, whose great importance in the eyes of Europe originated in commerce, and will endure no longer than whilst the same attention continues to be paid to her commercial interests. In a dissertation upon commerce, insurances form a very distinguished part, and therefore it cannot but be agreeable to the scholar as well as to the lawyer, to trace this branch of commercial law to its source, and to give some account of those various nations which have been rendered famous by the extent of their commerce and by the excellency of their maritime regulations. Indeed, in tracing the origin of insurances, an account of the maritime states that have existed in the world necessarily forms a part of the inquiry.

Insurance, then, is a contract by which the insurer undertakes, in 2 Blackst. consideration of a premium equivalent to the hazard run, to indemnify the person insured against certain perils or losses, or against some particular event. When insurance is generally mentioned by professional men, it is understood to signify marine insurances. It is in this light we are at present to consider it ; and from the preceding definition it appears to be a contract of indemnity against those perils to which ships are exposed in the course of their voyage from one place to another. The utility of this species of contract in a commercial country is obvious, and has been taken notice of by very distinguished writers upon commercial affairs. Insurances 3 Smith's give great security to the fortunes of private people, and by dividing Wealth of Nations, p. amongst many that loss which would ruin an individual, make it 148, 8vo. fall light and easy upon the whole society. This security tends ed. greatly to the advancement of trade and navigation, because the 1 Magens. risk of transporting and exporting being diminished, men will more 2.

\* The Preface of Lord Tenterden (Abbott) has been omitted.

easily be induced to engage in an extensive trade, to assist in important undertakings, and to join in hazardous enterprises; since a failure in the object will not be attended with those dreadful consequences to them and their families which must be the case in a country where insurances are unknown. But it is not individuals only that derive advantages from the increase of commerce; the general welfare of the public is also promoted. It is an observation justified by experience, that as soon as the commercial spirit begins to acquire vigour, and to gain the ascendant in any society, we immediately discover a new genius in its policy, its alliances, its wars and negotiations. No nation that cultivated foreign commerce ever failed to make a distinguished figure on the theatre of the world, as the history of the ancients sufficiently proves; and in proportion as commerce made its way into the various states of Europe, they turned their attention to those objects, and assumed those manners, which distinguish polished nations, and which lead to political consequence and eminence amongst the neighbouring powers.<sup>a</sup>

The origin of insurance, like that of many other customs, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occasioned much doubt among the writers upon mercantile law. Indeed it is involved in so much obscurity, that after all the researches which have been made on the present occasion, any very satisfactory solution of this doubt cannot be promised. One truth, however, is clear—that wherever foreign commerce was introduced, insurance must have soon followed as a necessary attendant, it being impossible to carry on any very extensive trade without it, especially in time of war. Some of these writers have ascribed the origin of this contract to Claudius Cæsar, the fifth Roman emperor, on account of a passage to be found in Suetonius. Other respectable authorities have given the honour of it to the Rhodians, thus laying a foundation for the idea entertained by many, that the law of insurance had obtained a place in most of the ancient codes of jurisprudence. As the consideration of this question will be attended with pleasure, it will tend much to the complete investigation of it, to consider the state of commerce amongst the most distinguished of the ancient nations, from whence it will appear that insurances were in those days wholly unknown; or if they were known, that the smallest proofs of the existence of such a custom have not come down to the present times.

The Rhodians claim the first place in this inquiry; for although there is undoubted testimony that nations of much greater antiquity than the people of Rhodes<sup>b</sup> cultivated commerce, and carried it on to a considerable extent, yet there does not appear to be the smallest ground for entertaining an opinion that any of these naval powers had established amongst themselves, much less communicated to

<sup>a</sup> Vide Robertson's View of the Progress of Society in Europe.

<sup>b</sup> Eusebius, in his account of maritime states, mentions three anterior to the Rhodians, namely; the Cretans, the

Lydians, and the Thracians; the first of whom flourished about 500 years before the Rhodians, the next 200, and the last about 80 years. Euseb. Chronicon, lib. 2.

Molloy,  
Malyne.

2 Atkyns;  
554.

Schomberg's  
Observ.  
on Rhodian  
Laws.

## INTRODUCTION.

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mankind in general, any code or system of marine laws. Rhodes obtained the sovereignty of the sea about 916 years before the Christian era, which was almost 200 years before the building of Rome. The situation and fertility of this island were peculiarly favourable for the purpose of navigation, for it lies in the Mediterranean Sea, a few leagues from the continent of Lesser Asia, and its wealth and fertility have always been celebrated by the poets and historians of antiquity. From these circumstances, joined to the activity and industry of the people, it long maintained that superiority which it had acquired; its inhabitants were rich, its alliance was courted, though from principles of policy it generally observed a strict neutrality. Notwithstanding this pacific disposition, which commerce naturally inspires, the Rhodians at last became an object of jealousy, and were most furiously attacked and besieged by various foreign powers. But in all their wars they discovered their great strength and superiority at sea, and conducted their enterprises with so much activity and skill, as to attract the admiration of their enemies and the applause of those historians who have given an account of the wars in which they were engaged. In the Punic wars, the Romans found the benefit of their alliance by the very essential service which they performed in attacking the naval armaments of the Carthaginians.

See Anderson's Hist. of Commerce.

Polybius, lib. 16; Schomb. Observ.

Wealth naturally produces luxury, which gradually enervates the powers of a state. This was the case with the Rhodians; for after maintaining their political importance from the time already mentioned till the termination almost of the Roman republic, they visibly began to decline in wealth and power. Cicero, in his speech on the Manilian law, observes that they were a people whose naval power and discipline remained even to the time of his memory, and Cicero expired with the republic.

Cicero pro Lege Manilia, cap. 13.

From this short history, it appears that the Rhodians were very famous for their naval power and strength; but however respectable they might be on that account, they were much more illustrious, and obtained a much higher praise among the nations of antiquity for being the first legislators of the sea, and for promulgating a system of marine jurisprudence, to which even the Romans themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs. These excellent laws not only served as a rule of conduct to the ancient maritime states; but, as will appear from an attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce. The time at which these laws were compiled is not precisely ascertained; but we may reasonably suppose it was about the period when the Rhodians first obtained the sovereignty of the sea, which was about 916 years before the era of Christianity. Selden says that the Rhodians maintained the sovereignty of the seas twenty-three years, and that their laws were compiled in the days of Jehoshaphat, king of Judah. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of Christ. Notwithstanding this, it will always remain a doubtful point when they were compiled; nor perhaps is it very

Selden's Mare clausum. lib. 1. cap. 10, a. 5.

- material that it should be accurately ascertained. It is of more consequence to know when they were adopted by the Romans ; but that is also a fact involved in some obscurity. We meet with no traces of them in the time of the republic ; and from the manner in which Cicero mentions them in the speech last alluded to, he treats of them as laws which had gained the admiration of the world, rather than of such as then made a part of the Roman code. Selden says that they obtained a place in the Roman law in the reign of Tiberius Claudius—a conjecture in which he is supported by Peckius, one of the commentators on the laws of Rhodes, and by the well-known character of Tiberius himself, who discovered the greatest attention to maritime affairs, and gave many signal instances of his attachment to Rhodes. But although these islanders were thus famous for their laws, we cannot discover, from the fragments that have come down to our times, that they had the smallest idea of the contract of insurance ; nor is there any tradition to induce us to conjecture that they ever were acquainted with that mode of securing their property. It is true that this is not a conclusive argument ; because, although no such contract is mentioned in the fragments which we have, it by no means follows that it did not form a part of their whole system, more especially as Emerigon, a very celebrated French writer of the present day, is of opinion that the real laws of the Rhodians have never reached us, and that the fragments which we see are certainly apocryphal. But as these laws were adopted by the Romans, it is fair to conjecture, that, whether we have the real regulations of Rhodes or not, we should have the contract of insurance, if it had been known to them, incorporated with the other naval laws in the imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of Rhodes, and with which the people of that island were certainly acquainted ; and in every book of the civil law the contract *de nautico fœnore, de usura maritima*, also forms a considerable part. It is not going too far then to presume that as the Romans adopted a contract so beneficial to commerce as that of bottomry ; they would not have passed over a contract of which the influence is still more extensively useful in the promotion of navigation and trade, if those from whom they borrowed their naval laws had themselves been acquainted either with its nature or advantages.
- Having said thus much of Rhodes and its laws, let us turn our attention shortly to the commerce of the Greeks. It is certainly true, that commerce flourished very much in several of the states of Greece, particularly in Corinth and Athens. The former separated two seas, was the key of Greece, and a city of the utmost importance ; its trade was extensive, having a port to receive the merchandises of Asia, and another, those of Italy ; and there have been but few cities where the works of art were carried to so high a degree of perfection. Athens, indeed, was particularly famous for commercial knowledge ; for their manufactures of all sorts were in high repute, and emulation was excited by the public rewards and honours which were bestowed upon those who attained to excellence in any of the useful arts. The attention of this people to maritime affairs (for they aimed at the
- Schomberg  
Obs. on  
Rhodian  
Laws.
- Mare clau-  
sum, lib. 1,  
cap. 10, s. 5.
- Sueton, Vi-  
ta Tiberii  
Claudii.
- Emerigon,  
Traité des  
Assurances,  
Preface, p. 3.
- Leg. Rhod.  
s. 1, art. 21 ;  
s. 2, art. 16.  
Digest. lib.  
22, tit. 2.  
Cod. lib. 4,  
tit. 33.
- Montesq.  
Esprit des  
loix, liv. 21,  
ch. 7.
- Taylor's  
Civil Law,  
p. 507.

sovereignty of the sea, and obtained it) contributed much to their skill in navigation. The many laws which they left to posterity, with regard to imports and exports, and the contract of bargain and sale; the many privileges granted to the mercantile part of the state; the appointment of magistrates, who had the cognisance of controversies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithstanding this, the Athenians, being of a very ambitious disposition, being more attentive to extend their maritime power than to enjoy it, and having a government of such a cast that the public revenues were distributed among the common people, to be squandered at their pleasure,<sup>a</sup> did not carry on so extensive a trade as might naturally be expected from the number of their seamen, from the produce of their mines, from their influence over the cities of Greece, and from those excellent laws and institutions which have been just enumerated. Their trade was almost entirely confined to Greece and to the Euxine sea. From such of their laws as we have seen, and from such accounts as we have obtained of their naval history, we have not the smallest reason to suppose that this celebrated people knew anything of the contract of insurance.

Potter's  
Grecian An-  
tiqu. vol. 1,  
p. 80, 83,  
84, 167.

Montesq.  
Esprit des  
loix, liv. 21,  
c. 7.

Some notice should have been taken before now of the Phenicians, an ancient, commercial, and opulent people. Indeed, the height of grandeur to which they attained is a sufficient proof of the vast resources of a commercial nation. Many writers, both sacred and profane, from their florid and magnificent descriptions, give a vast idea of their wealth and power. I forbore to speak of them till I should have occasion to mention one of their colonies, that of Carthage, which, in opulence, and the extent of her commerce and naval power, equalled, if not surpassed, the parent state herself. Whether either, or both of these maritime powers ever promulgated any code of naval law cannot now be ascertained; for the former was entirely destroyed by Alexander the Great, and, that it might never be restored, he removed its marine and commerce to Alexandria, in which removal, probably, all its naval regulations might be lost. Carthage, on the other hand, having long disputed with Rome the empire of the world, was at last obliged to yield to her victorious rival, who, even after she gained the victory, retained such a hatred to the Carthaginians, that she rooted out every vestige of their former greatness. No time, however, nor the hatred of the Romans, can wholly obliterate the amazing accounts which have come down to us, of the enterpris-

Beaues, Lex  
Merc. red.  
4th Edit.  
Introduct. p. 3.

Quint. Cur-  
tius, lib. 4,  
cap. 8, &c.

<sup>a</sup> From several of the orations of Demosthenes it appears, that the poor were entitled to receive from the public stock, as much money as would admit them to the diversions of the theatre; and besides this it was made a capital offence for any one to propose the restoration of the theatrical money, to its original uses. This custom was at length so much abused, that under pretence of theatrical

money, almost all the public funds were distributed among the people. Hence the Athenians contracted an aversion for war, and spent their time and money upon public stews. Of this enormity Demosthenes vehemently complains, and inveighs against it, with as much warmth, as from the nature of the law just mentioned he durst venture to do. See the first and also the third Olynthian.

Anderson's Hist. of Commerce, Introd. p. 31, 32, fol. Edit. Montesq. liv. 21, ch. 8.

ing spirit and hazardous voyages of the Carthaginians, almost exceeding the bounds of credibility. Thus much is certain, that they took such distant voyages, and went so far even without the Mediterranean, both to the South and North of it, as induced many people to suppose that they were acquainted with the use of the compass. It is evident, however, that they only followed the coasts. Besides, the ancients might sometimes have performed such voyages as would make one imagine that they had the use of the compass; for, if a pilot were far from land, and during his voyage had such serene weather that in the night he could always see the polar star, and in the day the rising and the setting sun, he might regulate his course by them nearly as we do now by the compass. This, however, must be a fortuitous case, and not a regular plan of navigation.\*

Montesq. liv. 21, ch. 9.

Ferguson's Rom. Rep. vol. 1, p. 100.

Sallust, Catilina, cap. 7.

From a slight attention to the commercial and maritime history of the Romans, it will appear that they were as great strangers to the contract of insurance as any of those people of whom much has been already said. It seems to be universally agreed that the Romans were never very conspicuous as a maritime power, considered either in a commercial or warlike point of view. In the latter case they relied chiefly on their land forces, who were disciplined to stand always firm and undaunted, and, till towards the latter age of the republic, when we read of some wonderful naval exertions, they do not seem to have possessed anything of a marine establishment. They never were distinguished by a jealousy for trade, and even when they attacked Carthage, they did it as a rival for empire, and not for commerce. It is recorded by historians, that till the first Punic war, upwards of four hundred years after the building of the city, the Romans were so entirely ignorant of ship-building that they took for a model a Carthaginian galley which had been accidentally stranded at Messina. Carthage, it must be observed, was at that time in her zenith of power and greatness; and yet, from the model of one of her galleys, the Romans were able, in sixty days from the time the timber was cut down, to fit out and man for sea one hundred galleys, of five tiers, and twenty of three tiers of oars. Such were the ships of the famous Carthage. The spirit of the people of Rome was entirely averse from commerce, and fully justifies what was said by a celebrated Roman historian, "*sese quisque hostem ferire, murum adscendere, conspici, dum tale facinus faceret, properabat; eas divitias, eam bonam famam, magnamque nobilitatem putabant.*" These exploits

\* What I have said in the text has been supposed by some not to do sufficient justice to the commercial and enterprising spirit of the Phenicians, who are said to have visited Britain about 900 years before Christ.\* I have already admitted the almost incredible voyages which they performed; but as it is also undoubtedly true, that they were unacquainted with the mariner's com-

pass, the honour of discovering which was reserved for later times, they must, in most cases, have followed the coasts. Nor does their visiting Britain militate against this idea; for by attending to the situation of the two places, the voyage might have been performed, though no doubt very tediously, without once losing sight of land.

\* See Borlase's Hist. of Cornwall, p. 27, and Henry's Hist. Great Britain, book i. chap. 6.

were the only glory of a Roman, no employment was deemed honourable but the plough and the sword, and every species of gain was deemed disgraceful to those of Patrician rank. But it was from the constitution of the government that individuals were possessed of this warlike spirit, so contrary to that which leads to eminence in commercial pursuits. The cast of their civil government was of a military nature, and for a considerable time the civil and military officer was the same person; he distributed justice in Rome, and commanded their legions in the field, till the vast increase of their empire, and the multiplicity of civil business, occasioned a separation. The natural consequence of this was, that no man who was not of the profession of his country was much esteemed at Rome; and accordingly we find that traders and mechanics were incapable of succeeding to any public honours. Nay, so far was commerce from being encouraged at Rome, that it was deemed prejudicial to the state. The Romans, by humanity, terror, triumphs, tributes, and taxes, which they imposed on the conquered countries, increased the riches of their city. Laws were passed to prevent the exportation of their gold; the reason of which seems to be, that it carried away their money, and brought them nothing in return but luxury, the bane of virtue, and destruction of empire. Could it be expected, says Doctor Taylor, that a people of soldiers, whose trade was their sword, and whose sword supplied all the advantages of trade; who brought the treasures of the world into their Exchequer, without exporting anything but their own personal bravery; who raised the public revenues, not by the culture of Italy, but by the tributes of provinces; who had Rome for their mansion, and the world for their farm, should have leisure to set forward the articles of commerce, or be likely to pay any regard to the character of its professors? The terms of defiance upon which they lived with all mankind, in consequence of this martial spirit, would have prevented all the good effects of commerce, had their disposition allowed them to pursue it. That restless spirit, which kept their armies on foot, and their swords in their hands, for a succession of centuries, was fatal to factories and correspondence. The world was in arms, and insurances and underwriting were but a dead letter. This is very nearly a true representation of the case, for it is certain that not one law was made in favour of commerce in the time of the commonwealth; on the contrary, it was greatly discouraged as introductory of luxury, which was supposed not to be compatible with the severity of their manners. It is also no less true than singular, that a people who were so well acquainted with the true principles of natural reason and justice, who applied those principles with so much propriety to the various wants and necessities of human society, and who had the honour of establishing a system of law, which has been adopted as the rule of action by the greatest part of Europe, and which continues to be so even at the present day, never attempted to introduce any plan of marine jurisprudence. Nay, this idea is carried farther by some writers, who declare, and I believe with truth, at least we can discover nothing to the contrary, that the Romans did not even take the pains to digest the materials which they had borrowed; and that whilst they carried every other branch of law to the highest pitch of

Livy, lib.  
21, cap. 63.

Taylor's  
Civil Law,  
p. 502.

Taylor, 498.

Civil Law,  
501.

Schomberg's  
observations  
on the Rho-  
dian laws.



accuracy and refinement, they were content to stand indebted to one of their own provinces both for the form and matter of their maritime code.

The Romans, it is true, after the first Punic war, constantly maintained a fleet; but long after that time, even in the year of the city 563, it was observed of them, that they were very unskilful in the art of navigation. One of their own historians, who flourished at the time of the second Punic war, and who was tutor to the great Scipio, justly remarks, that at no period did they ever make any figure at sea as a commercial power. Even when they arrived at their highest perfection in naval skill, their fleets were never employed for the purposes of trade, in the discovery of new states, or establishing commercial intercourse with those they already knew. The greatest extent of their commerce was to bring to the market of Rome that corn, which they collected in the various granaries of Sicily, Africa, and Egypt. Upon all other occasions the business of their fleet was to overawe the conquered, and to transport to Rome the spoils of ruined provinces. In such a state of commerce, it is impossible that insurances could exist; and we have already quoted the opinion of a respectable author to show that they were unknown.

There are several reasons applicable to all the ancient maritime powers, which seem to prove to demonstration, that insurances were not in use. We have seen, that insurances are only introduced where commerce is widely extended. The commerce of the ancients compared with modern times, could not be very considerable, as it was chiefly confined within the Mediterranean, Egean, and Euxine Seas: to which they were compelled more from necessity than inclination. Carthage, in all her glory, had not arrived at any great degree of perfection in the art of ship-building. Vessels of the best construction at that time could only be navigated with oars, or when they had a fair or a smooth sea: they might be built of green timber; and, in case of a storm, could run ashore under any cover, or upon any beach that was free from rocks: in short, they were merely galleys, and were managed with the greater difficulty on account of the position of the sails, and the mode of rigging practised in those days. This could not fail of proving a considerable obstacle to the extension of commerce. But when we consider, in addition to the bad construction of their ships, that the ancients were utterly ignorant of that unerring guide, the mariner's compass (the honour of inventing which was reserved for more modern times) by reason of which they durst not venture out of sight of land, for fear of being overtaken by tempests, and being left at large in the boundless ocean, their commerce could not have been great; although we are even led to admire the progress which they made in commercial affairs. It is true, that many distant naval expeditions were made under all these disadvantages, which often proved fatal to the adventurers.<sup>a</sup> These expeditions, however, could add little or

Polybius.

Dr. Taylor,  
*ut supra.*

Anderson's  
Hist. of  
Commerce.

Montesq.  
Esprit des  
loix, liv. 21,  
ch. vi.

<sup>a</sup> Huet, Bishop of Avranches, in his very instructive and entertaining treatise on the commerce and navigation of the

ancients has, with infinite labour and accuracy, collected the most remarkable facts on this head. Ch. 8.

nothing to their maritime or geographical skill, in which the ancients were certainly very deficient, on account of the necessity they were always under of coasting the shores, for want of a better guide; and, indeed, the shores were the only compass. These observations Montesq. are not intended to detract from that merit, which has been already vol. 2, ch. 6. allowed to the ancients for their naval exertions; because they are founded merely on a comparison of their powers and knowledge in those arts with the improvements of the moderns, and are adduced to show that, under such disadvantages and obstacles to the extension of their trade and commerce, it was impossible that insurances could be at all known to the ancient world.<sup>a</sup>

M. Emerigon agrees, that the contract of insurance, as it is understood at this day, was not in use among the Romans; but he thinks he discovers some traces of it in the history of that people. The first instance given by this learned writer is this, that about the time of the second Punic war, those who had undertaken to supply the troops in Spain with provisions and military stores, made it a previous condition that the republic should be at the hazard of exporting them, according to the words of Livy, "Ut quæ in naves imponerentur, ab hostium tempestatis vi, publico periculo essent." But with all deference to so great a name, this seems to bear no resemblance to the contract of insurance; for it is nothing more than every well regulated state is bound to do by the ties of natural justice. It is equitable and right, that those, who in times of danger, appropriating their private wealth to the advancement of the public service, should be reimbursed from the purse of the state for the private losses they may sustain. This indeed is the rule of conduct between man and man: for when one man purchases goods of another to be sent abroad, was it ever supposed that the seller was to run the risk of the voyage; or that if the goods perished he was never to be paid? If such a doctrine were to prevail in any country, the state could only be supplied with necessaries in time of war, by means of extortion, rapine, and violence.

Another instance given by Emerigon is a story, which we find recorded by Livy, of some men, who were charged with the care of exporting provisions for the army, and who, "qui publicum periculum erat a vi tempestatis in iis quæ portarentur ad exercitus," endeavoured by fraud to destroy the ship, and then told the directors of the state, that many very valuable articles were on board; whereas they had taken care to send out very old, rotten ships, in which were a few commodities, and those of small value. That part of this story which is material to the present inquiry, has already met with an answer in what was said upon the last quotation, and the propriety of a government's indemnifying those who might suffer in the public service, is not at all altered by the misconduct of some individuals.<sup>b</sup>

<sup>a</sup> See note a, page xii.

<sup>b</sup> It has been truly observed by Mr. Millar (for an account of whose work upon insurances see the preface to this second edition) that in these instances from the Roman historians, no mention

is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be considered as examples of a bounty offered by the public, than of a mutual contract.

Epistolæ ad Familiæres, lib. 3, epist. 17. The next instance is from one of Cicero's epistles, and is of a different nature from those last mentioned; because here Cicero seems to wish that the property in question should be secured, not only for himself, but also for the people of Rome. Cicero, having

Ferguson's Hist. of the Rom. Rep. book 4, ch. 5.

gained a victory in Cilicia, and the civil war between Cæsar and Pompey being then a matter almost unavoidable, wrote to Caninius Sallustius at Laodicea, in which letter he used these words: "Laodiceæ me prædes accepturum, arbitror omnis pecuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ periculo." From this passage it is inferred that Cicero alludes to insurance. I own, from the meaning of the word *prædes*, and from the situation of affairs at Rome, it seems as if Cicero wished rather to find some secure and substantial person at Laodicea, in whose care and custody he might leave this money till more peaceable times: and it is very unlikely that in such a troublesome conjuncture he should be desirous of bringing a great treasure to the scene of faction and confusion, especially as in a letter to his friend Atticus, he declares himself at a great loss to know what line of conduct he ought to pursue. But even if he wished to bring it to Rome, the mode he proposed seems more like the modern bill of exchange, than a policy of insurance.<sup>a</sup> Besides, unless this species of contract was at that time tolerably well understood, Sallust, the person to whom he wrote, would have found considerable difficulty in comprehending his meaning from the single sentence in his letter, which has been mentioned; and if it were well known, is it possible to suppose it would not have obtained a place in their code of laws?

Cicero ad Atticum, lib. 7, epist. 1.

Molloy, Malyn.

But the passage upon which those, who contend for the antiquity of this branch of commerce, have chiefly relied, is one to be found in Suetonius, in the eighteenth chapter of his life of Tiberius Claudius, the fifth emperor of Rome. "Negotiatoribus certa lucra proposuit, suscepto in se damno, si cui quid per tempestates accideret." This sentence wholly unconnected seems to convey such an idea; but we must attend to the context, in order to understand it. This relates merely to the corn-trade; for as the Roman territory was not sufficient to supply enough for the consumption of the city, it became absolutely necessary to give great encouragement to this branch of commerce: nay, it was a political, not a mercantile concern; for the very existence of the empire depended upon it. It was this circumstance, which induced the emperor to pay such regard to this branch of trade, to propose bounties, and to confer certain privileges, the *certa lucra*, of which Suetonius speaks, upon those who would venture out to sea for the public service in the midst of winter. Dr. Taylor tells us, that a private consideration also had some weight with Claudius upon this occasion, for that

Civil Law, p. 499.

<sup>a</sup> Since I published the first edition of this work I have looked into Melmoth's translation of Cicero's Epistles; and I am happy to find, that, without knowing I had such an authority, I have put the same sense upon this passage which that elegant translator had done before me.

The whole sentence is translated thus: "I purpose to leave the money at Laodicea, which shall arise from the sale of those spoils, and to take security for its being paid in Rome: in order to avoid the hazard both to myself and the commonwealth of conveying it in specie."

once in a great scarcity of provisions, he was attacked in the forum by the populace, and so disagreeably treated with abuse, and crusts of stale bread, that he with great difficulty escaped through some private passage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the risk, which Suetonius says the emperor took upon himself, it is to be observed, that, although the ships were private property, yet they would not have gone to sea in the dangerous seasons they did, had it not been for the public service, and to provide provisions for the use of the whole city. This being the case, we have already shown, that it would be contrary to the first principles of justice and equity, and to the practice followed at this day by all governments which are founded on just principles, to allow such losses to fall upon individuals.<sup>a</sup> From what has been said, it appears evident that the Romans had no knowledge of insurances; in addition to which, both Grotius and Bynkershoek have expressly declared, that among the ancients this contract was unknown; the latter of whom uses these expressions: "*Adeo tamen ille contractus olim fuit incognitus, ut nec nomen ejus, nec rem ipsam in jure Romano deprehendas.*"<sup>b</sup>

Grotius de  
Jure Belli,  
lib. 2, cap.  
12, s. 3.  
Bynk.  
Quæst. Jur.  
Publici, lib.  
1, cap. 21.

But to whatever degree of excellence the Romans attained, either in literature, commerce, or any of the refined arts, they all visibly declined when the Roman empire was overrun by the barbarians; or, perhaps it may be said with greater propriety, that they were overwhelmed and lost with that power, which had raised them to be the object of public attention and notice. For in times of public ruin and desolation, when war rears its standard, lays waste cities, and tramples on the noblest improvements, it is impossible for commerce to hold its station, or to flourish in the midst of contention and tumult.

It is the observation of a profound modern historian, that there is an ultimate point of depression, as well as of exaltation, from which human affairs naturally return in a contrary progress, and beyond which they seldom pass in their advancement or decline. This was the case with respect to commerce. When the repeated incursions

Hume's  
Hist. of  
England.

<sup>a</sup> The observations here made seem, upon examination, to be agreeable to the ideas of Dr. Taylor, the president Montesquieu, and Mr. Schomberg, upon the same subject. See also the opinion of a learned civilian, Langenbeck, of Ham-  
burgh, in Magen's Essay on Insurances.  
Vol. i. p. 1.

<sup>b</sup> By a late work of M. De Pauw, entitled *Recherches Philosophiques sur les Grecs*, it is manifest that the Athenians were well acquainted with the nature of bills of exchange; and this learned foreigner seems to think it a matter of uncertainty whether the insurances of ships was ever practised among them: but he says it is clear that barratry was not unknown to them. I am inclined, however, to think, with Grotius and Bynkershoek, that this con-

tract was as much unknown to that great people, as to the rest of the ancient world. If this had not been the case, can it be supposed that we should find no trace of it in their history, the speeches of their orators, or their laws? Is it not as likely to have been mentioned as bills of exchange? and particularly when barratry was mentioned, if this contract had had an existence, would it not have been stated on whom the loss was to fall? Besides, the instance given of barratry by M. De Pauw is not what we call barratry in England; for the case put is a case of fraud committed by the owners, who, by the law of England, cannot commit barratry, which is a criminal act of the captain, to the prejudice of his owners, and without their privacy or consent.

of the Barbarians had ravaged the Roman empire, and had checked every liberal improvement, some people, forced by necessity, or led by inclination, took shelter in a few marshy islands that lay near the coast of Italy, and which would never have been thought worth inhabiting in time of peace. This happened in the sixth century; and at the first settling of these wanderers, they had certainly no other object in view than that of living in a tolerable degree of security from their enemies, and of procuring a moderate subsistence. As these islands were divided from each other by narrow channels, and those channels were so encumbered by shallows that it was impossible for strangers to navigate them, they found that security which they wished; and by uniting among themselves for the sake of improving their condition, they became in the eighth century a well-established republic. This, though it may appear strange, was the origin of the famous republic of Venice, which soon became a great commercial power; for, from the first moment that those people took possession of the islands, necessity made them extremely attentive to commerce, the first beginning of which was, naturally, fishing. Next to fishing, they began to trade in salt, many pits of which were discovered in their own islands; and at last their city gradually became the magazine for the merchandise of the neighbouring continent on all sides, and they themselves the general carriers of Europe. Thus to the people of Italy, and to those of Venice and Genoa in particular, we are to attribute the re-establishment of commerce. Of the causes which contributed to its revival, it remains to speak.

Anderson's  
Hist. of  
Commerce,  
fol. vol. 1,  
pp. 19, 20.

Various causes concurred to revive the spirit of commerce, and to renew in some degree that intercourse between nations which, during the period of Gothic ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the Crusades, by leading many from every part of Europe into Asia, opened an extensive communication between the East and West; and though the avowed purpose of these expeditions was conquest and not commerce; though the issue of them proved as unfortunate as the motives for undertaking them were wild and enthusiastic, yet their commercial effects were beneficial and lasting. For the first armies which ranged themselves under the banner of the cross, having been led through a vast extent of country, and having suffered so much from the length of their march, and the barbarism and inhospitality of the people inhabiting those countries through which they travelled, others were deterred from taking the same course, and chose rather to go by sea than encounter so many hardships. Venice, Genoa, and Pisa, furnished the transports to convey the troops, and it is reported that the sums were immense which they received merely for freight. Besides this, the Crusaders contracted with them for supplies of military stores and provisions; their fleets hovered on the coast; and by supplying the army with whatever was wanting, they engrossed all the advantages arising from this branch of commerce. These states were also benefited by the success which attended the arms of these religious and enthusiastic heroes; for there are charters yet extant containing grants to the Venetians, Pisans, and Genoese, of great privileges in the various

Robertson's  
View of  
Society, &c.

nents which the Christians had gained in Asia. When the  
 lers seized Constantinople, the Venetians, who had planned  
 terprise, transferred to their own state many of the valuable  
 es of commerce which had formerly centered in Constanti-

Another great cause of the revival of commerce was the  
 ion of the mariner's compass, which, by rendering navigation  
 secure, as well as more adventurous, facilitated the communi-  
 s between remote nations, and brought them nearer to each

The honour of this invention, so beneficial to mankind, has  
 claimed by the French; and their claim has been allowed by Huet, *Traité*  
 l authors, and maintained by a celebrated writer of their own. du Com-  
 s opinion perhaps national partiality may have some weight. merce des  
 authors, however, agree that the inventor was Flavio de. Anciens,  
 a native of Amalfi, an ancient commercial city in the king- cap. 10.  
 f Naples.<sup>a</sup> Anderson's  
 Hist. of

s evident that almost all the commerce of Europe in those days  
 ed amongst the Italians. As they at that time carried on and  
 shed a regular trade with the East in the ports of Egypt, and  
 from thence all the rich produce of India, it is reasonable to  
 e, that, in order to support so extensive a commerce, these  
 rious and ingenious people were the first who introduced  
 nces into the system of mercantile affairs. It is true there is  
 æt authority to warrant a positive assertion that they were the  
 ors of this kind of contract; but it is certain that the know-  
 of it came with them into the different maritime states in  
 parties of them settled; and when it is admitted that they  
 he carriers, manufacturers, and bankers of Europe, it is pro-  
 that they also led the way to the establishment of a contract  
 is so essentially necessary to the support and cultivation of  
 rce. It has, however, been asserted by writers of the French  
 that insurance dates its origin in the year 1182, and that it  
 roduced by the Jews, who were banished from France about  
 eriod,<sup>b</sup> and who took that method to facilitate and secure the  
 al of their effects. They proceed to say that the Lombards,  
 ere not idle spectators of this contrivance, adopted it, and in a  
 time improved it considerably. It is not very necessary to  
 into the truth of this fact, nor indeed are there materials to

us to do so; but it is observable that the president Mon- Esprit des  
 u mentions that the Jews upon this occasion invented bills of Loix, liv.  
 ge, but does not say a syllable of policies of insurance. It is 21, c. 16.  
 , however, that if the Lombards were not the inventors, they

appears from Anderson, that some  
 ad supposed that the conquest  
 emagne in Italy, towards the  
 the 8th century, and his subse-  
 establishment of Christianity in  
 stern and northern parts of  
 y, contributed greatly to the  
 of commerce. In what I have  
 n this subject, I chose rather to

follow the steps of a very elegant and Anderson's  
 profound historian of modern times. introd. fol.  
 Robertson's *View of Society*, &c. edit. p. 7.

<sup>b</sup> Anderson says, the Jews were ban-  
 ished from France in 1143. Anderson's  
 History of Commerce, vol. i. p. 82. But  
 I believe such an event twice took place  
 in that kingdom.

were at least the first who brought the contract of insurance to perfection, and introduced it to the world.\*

Before we come to consider the amazing improvements which have taken place with respect to this branch of commerce in our own country in these days, it will be expected that some notice should be taken of those maritime codes and naval regulations which have distinguished the modern no less than the laws of Rhodes did the ancient world.

Vol. 1, p. 53.

To the people of Amalfi we are indebted as well for the first code of modern sea-laws as for the invention of the compass. We learn from Anderson that the city of Amalfi, so long ago as the year 1020, was so famous for its merchants and ships, that its inhabitants at that time obtained from the Caliph of Egypt a safe conduct, to enable them to trade freely in all his dominions; and they also received from him several other distinguished privileges. It was towards the close of that century that they promulgated their system of marine law, which, from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table superseded in a great measure the ancient *Jus Rhodianum*, and its authority was acknowledged by all the states of Italy for some centuries. But as trade increased very rapidly in other cities on the coast of the Mediterranean Sea, they became unwilling to receive laws from a neighbouring state, which they now equalled, if not surpassed, in the extent of their naval establishments. Every one, therefore, began to erect a tribunal, in order to decide all controverted points according to laws peculiar to itself, but still referring, in matters of higher moment, to the former rule of action, the Amalfitan Code. From such a variety of laws as must necessarily be the consequence of each of the Italian states becoming its own legislator, so much disorder and confusion arose, that general convenience at last compelled them to do that which jealousy of each other's power and growing commerce would for ever have prevented them from effecting; and at a general assembly it was agreed to digest the laws of all the separate communities into one body. Every regulation, therefore, which was thought to be founded in justice, either in the laws of Marseilles, Pisa, Genoa, Venice, or Barcelona, was collected into one mass, and published in the fourteenth century, under the title of *Consolato del Mare*. A French writer, "Sur la Saisie des Bâtimens neutres," speaks of this production in a very unfavourable way, and calls it a rude, ill-formed mass of maritime and positive regulations of ordinances of the middle ages, and of private decisions. Indeed when we consider that this was a compilation from the various regulations of so many different states, it could not excite much surprise if it really merited the censure of this author. But, upon examination, it is a work of considerable merit; the decisions

xx (x)  
Hubner.

\* I am aware that several learned men are of opinion, that insurances were of an earlier date than is here ascribed to them. On a subject where so much obscurity must necessarily exist, I am

by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the Lombards were the inventors. See also Mr. Mil-  
lar's Introduction.

## INTRODUCTION.

xxix

it contains are founded on the laws of nations ; it has been received and allowed to have the force of law in every part of Italy ; and it is the source from whence the people of that country, as well as those of Spain and France, have been said to derive many of their best marine regulations. Unfortunately, too, Emerigon has discovered that because one of the chapters in the *Consolato del Mare* overturns some favourite system of this learned author, he is out of humour with the whole composition. One thing, however, is clear—that neither the *Consolato del Mare*, nor the Amalfitan Code upon which it is founded, contains anything upon insurance law ; so that we have here another confirmation of the idea that this contract was not a production of very ancient times.\*

Vinnius in  
Peckium,  
190.

Emerigon,  
Preface, p.  
8.

The spirit of commerce was not, however, confined to the south parts of Europe ; it now began to extend itself among the inhabitants of the western coasts. But whatever maritime regulations they might have established among themselves, they were found not to be sufficiently extensive for the commercial intercourse, which began to take place in those countries in the course of the twelfth century. Accordingly, about the year 1194, Richard the First, King of England, on his return from his wild expedition to the Holy Land, having stayed to repose himself for some time at the Isle of Oleron, in the Bay of Biscay, an island which he inherited in the right of his mother, whose portion it was in marriage with his father, Henry the Second, gave orders for the compilation of a maritime code. Some authors suppose that the hardships and dangers, to which, in the course of his expedition, he saw adventurers by sea were exposed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their supposition is better founded, that the great intercourse between his English and French subjects, and their allies, required a certain general system of sea-law, for the more speedy and impartial determination of all disputes, which might occasionally arise. The laws of Oleron, therefore, which are in substance but an abstract of the old Rhodian laws, with some additions and alterations, accommodated to the practice of that age, and the customs of the western nations, were proposed as a common standard and measure for the more equal distribution of justice amongst the people of different governments. These excellent regulations were so much esteemed, that they have been the model, on which all modern sea-laws have been founded ; and two distinguished nations have contended for the honour of their production. France, jealous of the lustre which the English justly derive from the production of this code, with much anxiety claims this honour to herself ; and very distinguished authors have stood forth the champions of her claim. The substance of their argument is, that Eleanor, wife of Henry the Second, King of England, and Duchess of Guvenne, returning from the Holy Land, and having seen the beneficial effects of the *Consolato del Mare*, ordered the first draught of the judgments or laws of Oleron to be

Schomberg's  
Observations  
on the Rhodian  
Laws.

Sir Phillip  
Meadow's  
Observations  
on the Dom. of the  
Sea, c. 4.

Cleirac, Coutumes de la  
Mer, p. 2.  
Valin.  
Emerigon.

\* In what I have said upon the Amalfitan code, I have found myself extremely indebted to Mr. Schomberg's

very ingenious observations upon that subject, in his treatise on the maritime laws of Rhodes.



made: that her son Richard the First, returning from the same expedition, enlarged and improved what his mother had begun: that they were certainly intended for the use of the French merely, because they were written in the old Gascon French, without any mixture of the Norman or English languages: that they constantly refer for examples of voyages to Bourdeaux, St. Malo, and other seaports in France; never to the Thames, or to any port of England or Ireland: and that they were made by a Duchess and Duke of Guyenne, for Guyenne, and not for the kingdom of England. One of these learned writers adds a reason, which he thinks very conclusive, to prove that these laws were of French extraction, namely, that from their first appearance, their decisions have been treated with extreme respect in the courts of France.

Valin.

In these days, it is very immaterial whether France or England is entitled to the honour they respectively claim, and I shall not tire the reader with any argument upon the point.\*

Vol. 1, p.  
454.

Anderson, in his History of Commerce, has expressly stated, but he does not adduce any authority in support of his opinion, that the laws of Oleron treat of insurances. I have read them repeatedly, with the direct view of discovering whether insurances were of so ancient a date: but I have not found a single word, which could induce me to subscribe to such an assertion. In confirmation of my opinion, Emerigon, speaking of these laws, has observed, "Il n'y est pas dit le mot du contrat d'assurance, qui apparemment n'étoit pas encore alors en usage."

Preface, p.  
11.

Cleirac, Us  
et Coutumes  
de la Mer.  
Emerigon,  
Pref.

But while we pay due respect and veneration to those maritime regulations which distinguished the southern and western parts of Europe, it would be improper silently to pass over the laws, which were ordained by an industrious and respectable body of people, who inhabited the city (Wisbuy, famous for its commerce, and renowned on the shores of the Baltic. The merchants of this city carried on so extensive a trade, and gave themselves up so entirely to commerce, that they must doubtless have found a great inconvenience in having no maritime code, to which they could refer to decide their disputes. To such a cause we are probably indebted for those laws and marine ordinances, which bear the name of Wisbuy, which were received by the Swedes, at the time they were composed, as a just and equitable rule of action, and which were long respected (and, for aught I know, are to this day observed) by the Germans, Swedes, Danes, and by all the northern nations: although the city in which they received their origin, has long dwindled into insignificance and contempt. At what time these laws were compiled, is a matter of dispute; and different writers have adopted different periods, in order to answer their own particular ends, or to advance the honour of that age which it happened to be their business to extol. The writers of the north pretend that Wisbuy was a great commercial city in the ninth century; from whence they argue, that their laws must be of very high antiquity; that they were the model, from which

\* For the arguments in favour of the English claim, the reader may consult Selden's *Mare Clausum*, lib. 2. cap. 24.

Mr. Just. Blackstone's *Commentaries*, vol. i. page 418. Schomberg's *Observations*, page 88.

those of Oleron were copied, and that they were received and acknowledged by all nations in Europe, even to the Straits of Gibraltar. On the other hand, it is answered, and with much strength of reasoning, that the northern code is a transcript from that of Oleron, although it contains several additions: for it has been shown that the laws of Oleron were promulgated by Richard the First about the close of the twelfth century, at which time, as appears by the report of the Swedish historian, the city of Wisbuy was not built, nor for near a century afterwards; that the inhabitants were merely strangers collected together from different parts, who, so far from having any power or influence over their neighbours, were not absolute masters of their own city. Besides, if their laws had been prior to those of Oleron, we should have found in the latter some regulations respecting insurances; because a copyist never would have omitted so material a branch of commercial legislation, the laws of Wisbuy having expressly mentioned insurances, and provided, that if the merchant obliged the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea.

Cleirac, 4.

Olaus Magnus, lib. 10, cap. 16.

Art. 66.

Afterwards, towards the close of the fifteenth century, we find from history, that many considerable regulations were made at Barcelona in Spain, respecting marine insurances.

Robertson's View, vol. 1, p. 351, quarto edit. Emerigon, Pref. p. 12.

But if the laws of Wisbuy were not prior to those of Oleron, yet it is much to their honour, and shows in what estimation they were held in the greatest part of Europe, that, after having for a long course of time enjoyed the highest authority in all the northern tribunals for maritime affairs, they were thought worthy of being adopted as the basis of the ordinances of the Hanseatic League. Of this ancient and famous confederacy, it will be sufficient in this place to observe, that it began about the thirteenth century, and originated with the cities of Lubeck and Hamburgh, which were obliged to enter into a league of mutual defence, in order to protect themselves against the nations round the Baltic, who were extremely barbarous, and infested that sea with their piracies. These two cities derived such advantages from their union, that other towns acceded to the confederacy, and in a short time, eighty of the most considerable cities, scattered through these countries, which stretch from the bottom of the Baltic to Cologne upon the Rhine, joined in the Hanseatic League; which became so formidable, that its alliance was courted, and its enmity dreaded, by the most powerful monarchs. This association, it is said, formed the first systematic plan of commerce known in Europe: but, notwithstanding this, they did not for a long time publish any maritime code, but were entirely governed by those of Oleron and Wisbuy. At a general meeting, however, held at Lubeck, in the year 1614, it was agreed to extract from those compilations whatever should be thought most useful, and that it should in future be the rule of decision in every contested point. It was prior to this time, about the fourteenth century, that the members of this League were in their greatest splendour; their commerce was at its height; they supplied the rest of Europe with naval stores, and they pitched

Schom. Observ. 106.

Robertson's View of Society.

Kuricke, Comm. Schomb. Observ.

Robertson's View, &amp;c. Ander. Hist. of Comm.

Hume's  
Hist. of  
England,  
vol. 4, pp.  
348, 349.

upon different towns, the most eminent of which was Bruges in Flanders, where they established staples, in which their commerce was regularly carried on. The sovereigns of Europe looked up to the Hanseatic League with esteem and admiration, and the Kings of France and England granted them considerable privileges. But when this union had rendered them rich and powerful, they grew arrogant and overbearing, which induced the princes, whom they had offended, to take a closer and more accurate view of the danger which might arise from such a confederacy, and of the advantages which might accrue to themselves from the possession of their trade. These causes at last concurred to effect the decay of this alliance, which, however, is not wholly dissolved at this day; as the cities of Lubeck, Hamburgh, and Bremen, maintain sufficient marks of that splendour and dignity with which this confederacy was anciently distinguished.

Having thus taken a brief but comprehensive view of the most considerable maritime states both of ancient and modern times, I forbear to go more at length into the history of several governments, which have published naval regulations for the direction of their own subjects; because they are only binding within their own particular districts; they are very similar to those about which so much has been already said; they are all collected by Magens in the second volume of his *Essay on Insurances*, and are occasionally referred to in the course of the ensuing work. Besides, I hasten to give an account of the vast improvements, which have been made in this country within these last thirty years, with respect to insurances, and which are the main object of this inquiry. It would, however, be improper in a work of this nature, entirely to pass over the French nation, the maritime strength of which has of late years considerably increased; and whose writers upon commercial affairs would reflect honour upon any country.

Few people understand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that France, from her situation, from the bent of her people to certain manufactures, from the happiness of her soil, and her natural advantages, must be always possessed of a great internal and external trade, which must add greatly to her wealth, and render her the most respectable power on the Continent of Europe. But the French do not naturally possess that undaunted perseverance which is necessary for commerce and colonisation. It is, besides, a great disadvantage to the commerce of France, that, as its government is military, the profession of a merchant is not so honourable as in England, so that the French nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their ancestry to allow any of their sons to follow the business of a merchant. The consequence of this is, that the church, the law, and the army, are stocked with the members of noble families; and the counting-house is by them entirely deserted. At one period, indeed, there was an appearance that France would make as illustrious a figure amidst the powers of Europe in trade as she then did as a warlike nation. The period to

which I allude was under the administration of the famous Colbert, <sup>Vie de Col-</sup> who, next to Henry the Great, may justly be styled the father of the bert. French commerce and manufactures. This illustrious man, who was of Scotch extraction, descended of a family no way considerable by its splendour or antiquity, raised himself by his activity, diligence, and knowledge of commerce, to the first offices under the government of France. Being appointed to the superintendence of the finances, he proposed such regulations as brought about the purpose he intended, the orderly and frugal management of them; and established the trade of France with the East and West Indies, from which she has reaped considerable benefits. He also patronised and encouraged the liberal arts and sciences, reformed the courts of justice, and introduced many important regulations which regarded the order of society. But in 1669, when appointed secretary of state, and entrusted with the management of affairs relating to the sea, he had a full opportunity of exerting those talents which he so eminently possessed, and for the exertions of which his name has been transmitted with so much honour to posterity. In order to gain a proper insight into the true effects of commerce upon the various nations of the world, and the advantages of some particular branches of trade, he procured and employed learned and diligent men to inquire into the commercial histories of cities long since destroyed, and the nature of the climate, soil, and productions of the countries then rising into notice. It was to this spirit of inquiry in this famous statesman that the world is indebted, as appears from the dedication, for that very masterly performance upon the commerce and navigation of the ancients, written by Huet, bishop of Avranches and Soissons, who is justly entitled to a high rank among men of letters. Colbert, having thus made use of the labours of others in order to gain useful information, undertook to restore the navy and commerce of France; and he completed all his services by the publication of that excellent body of sea-laws, known by the name of the Ordonnances of Louis the Fourteenth, which comprehend everything relating to naval or commercial jurisprudence, and of which the doctrine of insurances forms a considerable part. To its merits all Europe has borne testimony, and the name of Colbert must ever be mentioned with respect, when the ordinances of Louis the Fourteenth are the subject of conversation.\*

Huet, Hist. du Commerce et de la Navigation des Anciens, Pref.

Vie de Colbert.

L'Honneur François, tom. 7, p. 502.

This ordinance has had the good fortune to meet with a laborious commentator in Valin, who, being thoroughly sensible of the advantages which his country must necessarily derive from such an excellent code, has, with a degree of labour and industry which excite our admiration, and which are highly deserving of imitation, placed it in the most favourable point of view, has cleared up every obscurity, by tracing these laws to their ancient sources, and by a full investiga-

\* It was under the administration of Colbert, that the French laid the foundation of Quebec on the banks of the river St. Lawrence; and he performed a work, which, says a French historian, even in the eyes of Richelieu seemed to surpass human power; and that was to

effect a junction between the Atlantic and the Mediterranean, by means of a canal, the execution of which attracted the admiration of Europe, and added much to the splendour of French commerce.

L'Honneur François, tom. 7, p. 302.

tion of old ordinances, and the decisions of former tribunals, has added much to the mass of learning upon subjects of this nature. But of all the sources from which modern French legislators could derive the most essential information, the famous treatise, called "Le Guidon," was the chief. This tract was republished by Cleirac, who pays a due compliment to its merits in his work upon the Usages and Customs of the Sea; and, although in its style and manner it certainly savours of the rust of antiquity, yet it contains the true principles of naval jurisprudence. If the style be antiquated, and the text be corrupted in some places, yet the treatise is still valuable, by the wisdom which shines through the whole and the number of decisions which it contains.

Cleirac, p.  
213.

Upon this occasion let me not forget to take proper notice of two very modern and distinguished French writers, M. Pothier and M. Emerigon. The former of these has written admirable dissertations upon every species of express and implied contracts, and, amongst the rest, upon that of insurance; he has considered his various subjects with so much clearness and perspicuity, and has produced so many apposite examples in support of the positions he advances, that they greatly contribute to the advancement of the knowledge of this branch of jurisprudence. His style is at the same time manly, neat, and classical, and well suited to didactic discourses.

Pothier,  
tom. 3 duod.  
p. 1.

Traité des  
Assurances.

M. Emerigon has, in his work, confined himself to the consideration of marine insurances, and to the contract of bottomry. This being the case, he has gone into those subjects much more at length than any former French writer, and has, with infinite labour, unwearied study and reflection, collected the decisions and authorities applicable to the purpose of his work. This learned foreigner, I understand, holds a distinguished rank among the advocates of his own country; and his treatise upon insurances will by no means diminish his fame.

Hume's  
Hist. of  
Eng. 8vo.  
edit. vol. 2,  
p. 494.

Robertson's  
View of  
Society, &c.

We have seen that the naval reputation of the English had arrived at a great height in the twelfth century, for the laws of Oleron, of the merits of which much has been said, were at that time compiled by an English monarch, and received here as the regulator of naval affairs. The progress of commerce, however, in this country, was not answerable to so auspicious a beginning, for, in the reign of Edward the Third, upwards of a century afterwards, commerce and industry were at a very low ebb. That monarch, struck with the flourishing state of the Northern provinces, which have been already described, and perceiving the true cause of their prosperity, endeavoured to excite a spirit of industry among his subjects, who seemed to be blind to the advantages of the situation, and ignorant of those sources from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt those manufactures, the materials of which they themselves supplied to foreigners. Notwithstanding the endeavours of Edward, and the many wise establishments proposed and encouraged by him, it was not till the reign of Elizabeth that the English began to discover their true interests, and the arts by which they were to obtain that pre-eminence and rank which they now hold among commercial

nations. This slow progress of commerce in this country may be accounted for on various grounds. During the Saxon Heptarchy, England was split into many kingdoms, perpetually at variance with each other; it was exposed to the fierce incursions of the Northern pirates, it was sunk in barbarity and ignorance, and consequently was in no condition to cultivate commerce, or to pursue any system of wise or useful policy. To this succeeded the Norman conquest, and all the consequences of a feudal government, military in its nature, hostile to commerce, and the arts and refinements of a liberal and civilised people. Scarcely had the nation recovered from the shock occasioned by this revolution, when it was engaged in supporting its monarch's pretensions to the French crown, and it long continued to waste its vigour and wealth in wild endeavours to conquer that country. To this we may add the destructive civil wars between the houses of York and Lancaster, which long deluged the kingdom with blood, and to which a period was at last happily put by the union of their several titles to the crown, in the person of Henry the Eighth. The Reformation then took place under that monarch, and it was not till the reign of Elizabeth that the feuds and dissensions which such an important event was likely to occasion, began to subside. During her long reign, and her wise and prudent administration of government, commerce began to rear its head, and found shelter and protection from the managers of public affairs. From this short sketch it is not much to be wondered at that England was one of the last nations of Europe which availed herself of her great commercial advantages; but she has since made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce, and the wise laws and regulations to be found in her system of maritime jurisprudence.

While commerce continued in this weak and languid state, it cannot be supposed that insurances, which spring from commerce, were at all encouraged or understood. It is true, the Lombards came into England in the thirteenth century, and it is universally agreed, that whatever may have been the origin of insurances, they were introduced into England by that active and industrious people. This idea is countenanced and confirmed by the clause to this day inserted in all policies of insurance, "that this writing or policy of assurance, shall be of as much force and effect as any writing heretofore made in Lombard-street, &c.," the place where these Italians are known to have taken up their residence, and carried on their trade. The preamble to the statute of Queen Elizabeth, which will be presently mentioned, speaks of insurances, as having existed time out of mind in this kingdom. Be this as it may, it is certain that, prior to the reign of that princess, very few insurances had been effected; or, if effected, no question had ever arisen upon them in any of the superior courts. So little were the judges acquainted with the nature of the contract, that, so late as the 30th and 31st of Elizabeth's reign, it became a question where an action upon a policy of insurance should be tried, the policy having been effected in London, and the ship detained in the river Soane, in France. The policy was on a ship from Melcombe Regis, in the county of Dorset, to Abbeville in

Anderson's Hist.  
of Comm.  
  
Vide the  
Appendix,  
No. 1.

6 Coke Rep. 47 b. France. The plaintiff declared, that the ship, in sailing towards Abbeville, to wit, in the river of Soane, was arrested by the king of France. The parties came to issue upon the question, whether the ship was so arrested or not : and it was tried before Lord Chief Justice Wray, in the city of London ; and a verdict was found for the plaintiff. In arrest of judgment it was moved, that this issue arising merely from a place out of the realm, could not be tried in London. But it was resolved by the court, that this issue should be tried where the action was in this case brought ; for the promise which is the ground and foundation of the action, was made in London ; and the arrest now in issue is not the ground of the action, which is founded on the *assumpsit*, and the arrest is the breach of the *assumpsit*.

This is the most ancient case I have been able to find upon the subject of insurances ; and I thought proper to insert it here, as the best proof that, prior to the reign of Elizabeth, this contract could have been very little, if at all, known. We have seen, however, that under Elizabeth, the genius of England began to display itself : about which time also, the legislature began to think the regulation of matters of assurance an object well worthy their most serious attention ; and it cannot but afford us much pleasure to find that, even in that early age, the true principles upon which this species of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully understood. In the preamble to an Act of Parliament, passed in the 43rd year of the reign of Queen Elizabeth, concerning matters of assurance used amongst merchants, the sense of the legislature upon the subject is expressed with clearness and perspicuity. After reciting that it has ever been the policy of this nation to encourage trade, and that policies of assurance have existed time out of mind, it goes on to state the advantages to be derived from their encouragement in a commercial nation. “ By means of which policies of assurance, it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many, than heavy upon few, and rather upon them that adventure not, than upon those who do adventure ; whereby all merchants, especially those of the younger sort, are allured to venture more willingly, and more freely.”

43 Eliz. ch.  
12.

13 & 14  
Car. 2, ch.  
23.

The purpose of that statute was, to erect a particular court for the trial of causes, relative to policies of insurance, in a summary way ; and to that end the statute ordained, that a commission should issue yearly, directed to the Judge of the Admiralty, the Recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all such causes, arising in London ; and it also gave an appeal from their decision, by way of bill to the court of Chancery. But this statute not entirely answering the intention of the legislature, some further regulations were made by a subsequent statute : such as the reduction of the number necessary to constitute a quorum. I forbear entering at length into this matter, the court erected by these statutes being now entirely disused. The reasons of this may be collected from some few decisions in our reporters : but one appears on the

face of the statute itself, namely, that its jurisdiction was not sufficiently extensive, being confined to such causes only as arose in London.

By a case reported in Style we find, that a prohibition issued to Bendir v. the court of Policies of Insurance, to prevent it from proceeding in Oyle, Style, a case of insurance upon a life, the Court of King's Bench being of 166. opinion, that the statute only meant to give the court below cognisance of such contracts only, as related to merchandise.

In another case it seemed to be the opinion of the Court of King's Dalbie v. Bench, that the jurisdiction of this newly-erected court did not extend Proudfoot, to suits brought by the assurer against the assured; but only to such 1 Shower, as were prosecuted by the latter against the former. It is true, in 396. Sir Bartholomew Shower's note of the case, no decision appears to have been made; but a rule to show cause why a prohibition should not issue, was obtained; and no notice is afterwards taken of it, although the learned reporter was himself the counsel in the cause, who had obtained the original rule.

But a case reported in Siderfin seems to have struck a more severe blow at the existence of this court than any of these cases I have mentioned; for it was there held, that it was no bar to an action upon a Policy of Insurance at the common law to say, that the plaintiff had sued the defendant for the same cause, in the court erected by the statute of Elizabeth, and that his suit was there dismissed. *Case v. Moy, 2 Siderfin, 121.*

These causes co-operating together probably with some instances of partiality in the judges, this court fell into disuse, no commission having issued, for many years; but insurance causes are now decided, like all other questions of property, and by that mode of trial most agreeable to the nature of our constitution—by a trial in a court of common law. *Lex Merc. Red. 4th. edit. p. 292.*

It has been much the fashion of late years to insist upon the advantages which the trading part of the nation would derive from the establishment of some equitable and amicable judicatory for the trial of all disputed points in matters of insurance. This is only another proof of the weakness and fallibility of the human mind, which is never satisfied with the enjoyments within its reach, however excellent they may be; but pants after those of foreign growth. Thus, a people who are possessed of a species of trial the best calculated for the discovery of truth, and the advancement of justice, and which has excited the admiration of the world, are desirous of parting with such an advantage for a mode of trial which is very unsatisfactory.

The court erected by the statute of Elizabeth, and which has now fallen into disuse, is perhaps one of the strongest arguments that can be adduced to prove, that such a judicature is not congenial to the spirit and disposition of Britons, nor well adapted for the purposes of its institution. It is universally agreed by all writers upon jurisprudence, that nothing tends so much to the elucidation of truth, and the detection of fraud, as the open *visd voce* examination of witnesses, in the presence of all mankind; before judges who, from their knowledge of books and men, acquired by long study and experience, are well qualified to discriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of ob-



serving the appearance, countenance, inclination, and deportment of those who are thus examined upon oath. Besides, the subjects of those states which have established these equitable tribunals, sensible of the superior advantage of the English institution, feeling that, in great mercantile questions, the greatest attention is paid to the eternal and immutable principles of reason, and that all men, whether natives or foreigners, here meet with an equal measure in the administration of justice,—fly to this country to make their contracts of insurance, that, in case of a dispute, they may have the benefit of its laws. Did it fall within the compass of this inquiry, I could relate many cases, of the truth of which I have not the smallest reason to doubt, which would serve to show the idea entertained by foreigners of our mercantile jurisprudence, and the high repute and estimation in which our judges are justly held by the European nations.

But though the Court of Policies of Assurance has been long disused, though it is near a century since questions of this nature became chiefly the subject of common law jurisdiction, yet I am sure I rather go beyond bounds if I assert that in all our reporters, from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance. Even those cases which are reported are such loose notes, mostly of trials at *nisi prius*, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject. From hence it must necessarily follow that, as there have been but few positive regulations upon insurances, the principles on which they were founded could never have been widely diffused nor very generally known.

This was owing to some defects which were discoverable in the proceedings in our courts, and in the delays and expenses which suitors experienced; so that they rather chose to submit to their first loss than be harassed by the delays of the law, or be at the expense of trying a question of which the decision might perhaps be of less moment to the individual than to the public. These defects were so glaring, that it was one of the first acts of Lord Mansfield's administration to apply a remedy; and his labours have been happily attended with such success, that they have been of essential service to the nation in general, considered in a commercial light, and have excited the applause and approbation of Europe.

Before the time of this venerable judge, the legal proceedings, even on contracts of insurance, were subject to great vexations and oppressions. If the under-writers refused payment, it was usual for the insured to bring a separate action against each of the under-writers on the policy, and to proceed to trial on all. The multiplicity of trials was oppressive both to the insurers and insured; and the insurers, if they had any real point to try, were put to an enormous expense before they could obtain any decision of the question which they wished to agitate. Some under-writers, who thought they had a sound defence, and who were desirous of avoiding unnecessary costs or delay to themselves or the insured, applied to the Court of King's Bench to stay the proceedings in all the actions

but one, undertaking to pay the amount of their subscriptions with costs, if the plaintiff should succeed in the cause which was tried; and offering to admit on their part everything which might bring the true merits of the case before the court and jury. Reasonable as this offer was, the plaintiff, either from perverseness of disposition or the illiberality and cunning of his advisers, refused his consent to the application. The court did not think themselves warranted to make such a rule without his consent; but Mr. Justice Denison intimated that if the plaintiff persisted, against his own interest, in his right to try all the causes, the court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord Mansfield then stated the great advantages resulting to each party by consenting to the application which was made, and added, that if the plaintiff consented to such a rule, the defendant should undertake not to file any bill in equity for delay, nor to bring a writ of error, and should produce all books and papers that were material to the point in issue. This rule was afterwards consented to by the plaintiff, and was found so beneficial to all parties, that it is now grown into general use, and is called the Consolidation Rule. Thus, on the one hand defendants may have questions of real importance tried at a small expense, and, on the other, plaintiffs are not delayed in their suits by those arts which have too frequently been resorted to in order to evade the payment of a just demand. 2 Barnard, 103. X  
B. R. 103.

In former times the whole of the case was left generally to the jury, without any minute statement from the bench of the principles of law on which insurances were established; and as the verdicts were general, it is almost impossible to determine from the reports we now see upon what grounds the case was decided. Nay, even if a doubt arose in point of law, and a case was reserved upon that doubt, it was afterwards argued in private at the chambers of the judge who tried the cause, and by his single decision the parties were bound. Thus, whatever his opinion might be, it never was promulgated to the world, and could never be the rule of decision in any future case.

Lord Mansfield introduced a different mode of proceeding; for, in his statement of the case to the jury, he enlarged upon the rules and principles of law as applicable to that case, and left it to them to make the application of those principles to the facts in evidence before them. So that if a general verdict were given, the grounds on which the jury proceeded might be more easily ascertained. Besides, if any real difficulty occurred in point of law, his Lordship advised the counsel to consent to a special case. In a special case the facts are either admitted by the parties, or, if they are disputed, are proved; and then the judge takes the opinion of the jury upon those facts, reserving the question of law to be agitated elsewhere. These cases are afterwards argued, not before the judge in private, but in open court, before all the judges of the bench from which the record comes. Thus nice and important questions are now not hastily and unadvisedly decided, but the parties have their case seriously considered and debated by the whole court; the decision becomes notorious to the world; it is recorded for a precedent of

law arising from the facts found, and serves as a rule to guide the opinions of future judges.

It had also been the custom, when cases were reserved, to leave it to the counsel on both sides to draw them up at their leisure. This introduced considerable delays, for every fact became again a subject of dispute; and frequently, from the hurry of business and other avocations of the counsel, the case was neglected for a considerable time before it was ready for the inspection of the court.

Now, whenever a case is reserved, the judge himself dictates to the clerk of the court the facts which ought to be stated, and the question upon which the opinion of the court is required; and, in addition to this, Lord Mansfield, whose rules are now the subject of our inquiry, ordered that all cases so reserved must be set down for argument within the first four days of the term following the trial, otherwise the judgment must be entered according to the finding of the jury.

Raynard v.  
Chase, 1  
Barrow, 5,

One additional improvement in the proceedings remains to be mentioned. Before Lord Mansfield's time, it was almost a matter of course not to decide any case without hearing two arguments upon it; but, in the very first cause which is reported of his Lordship's decisions, he expressed himself to this effect: "Where we have no doubt, we ought not to put the parties to the delay and expense of a farther argument, nor leave other persons, who may be interested in the determination of a point of a general nature, unnecessarily under the anxiety of suspense." When we add to these wise regulations the consideration that Lord Mansfield, during his long administration of justice, has given up a great part of his time, and has employed his talents in the elucidation of those points which tend to fix the system of mercantile jurisprudence upon the surest grounds, we need not wonder that that part of it which relates to marine insurances has attained to its present state of perfection.

A complete system of jurisprudence cannot be suddenly erected; but there is rather matter to excite our wonder that so much has been done in this respect within the last thirty years, than ground to complain that little has been effected.\* It is the boast of this age, that in it, the great foundations of marine jurisprudence have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases. It will be the business of the following work, which professes to lay down a system of the law as it now stands, to point out, amongst other things, the improvements which have been made by the legislature from time to time on the system of insurances, by many wise statutes and salutary restrictions, and to prove that the learned judges of the courts, both of law and equity, by their liberal and equitable constructions of those statutes, and by adopting the true principles of commerce in their decision of the many intricate cases which have been brought before them, have added another pillar to that beautiful structure of rational jurisprudence which has deservedly acquired the admiration of mankind.

\* Written in 1787.

## A PROCLAMATION.

VICTORIA, R.

WHEREAS by the Customs Consolidation Act, 1853, section 150, certain goods may, by Proclamation or Order of Her Majesty in Council, be prohibited either to be exported or carried coastwise; and whereas We, by and with the advice of Our Privy Council, deem it expedient and necessary to prohibit the goods hereinafter mentioned either to be exported or carried coastwise; We, by and with the advice aforesaid, do hereby order and direct, that from and after the date hereof, all arms, ammunition and gunpowder, military and naval stores, and the following articles, being articles which We have judged capable of being converted into, or made useful in increasing the quantity of, military or naval stores, that is to say: marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article, or any other component part of an engine or boiler, or any article whatsoever which is, can, or may become applicable for the manufacture of marine machinery, shall be, and the same are, hereby prohibited either to be exported from the United Kingdom, or carried coastwise.

Arms ex-  
ported, or  
carried  
coastwise.

Given at Our Court, at Buckingham Palace, this eighteenth day of February, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventeenth year of Our reign.

GOD save the QUEEN.

## DECLARATION OF WAR.

It is with deep regret that Her Majesty announces the failure of Her anxious and protracted endeavours to preserve for Her People and for Europe the blessings of peace.

The unprovoked aggression of the Emperor of Russia against the noble Porte has been persisted in with such disregard of consequences, that after the rejection by the Emperor of Russia of terms which the Emperor of Austria, the Emperor of the French, and the King of Prussia, as well as Her Majesty, considered just and equitable, Her Majesty is compelled by a sense of what is due to the honour of Her Crown, to the interests of Her People, and to the independence of the States of Europe, to come forward in defence of an Ally whose territory is invaded, and whose dignity and independence are assailed.

Her Majesty, in justification of the course she is about to pursue, refers to the transactions in which Her Majesty has been engaged.

The Emperor of Russia had some cause of complaint against the Sultan with reference to the settlement, which His Highness had sanctioned, of the conflicting claims of the Greek and Latin Churches to a portion of the Holy Places of Jerusalem and its neighbourhood. To the complaint of the Emperor of Russia on this head, justice was done; and Her Majesty's Ambassador at Constantinople had the satisfaction of promoting an arrangement to which no exception was taken by the Russian Government.

But while the Russian Government repeatedly assured the Government of Her Majesty that the Mission of Prince Menchikoff to Constantinople was exclusively directed to the settlement of the question of the Holy Places at Jerusalem, Prince Menchikoff himself pressed upon the Porte other demands of a far more serious and important character, the nature of which he in the first instance endeavoured, as far as possible, to conceal from Her Majesty's Ambassador. And these demands, thus studiously concealed, affected not the privileges of the Greek Church at Jerusalem, but the position of many millions of Turkish subjects in their relations to their Sovereign the Sultan.

These demands were rejected by the spontaneous decision of the Sublime Porte.

Two assurances have been given to Her Majesty; one, that the Mission of Prince Menchikoff only regarded the Holy Places; the other, that his Mission would be of a conciliatory character.

In both respects Her Majesty's just expectations were disappointed.

Demands were made which, in the opinion of the Sultan, extended to the substitution of the Emperor of Russia's authority for his own, over a large portion of his subjects; and those demands were enforced by a threat: and when Her Majesty learnt that, on announcing the termination of his Mission, Prince Menchikoff declared that the refusal of his demands would impose upon the Imperial Government the necessity of seeking a guarantee by its own power, Her Majesty thought proper that Her Fleet should leave Malta, and, in co-operation with that of His Majesty the Emperor of the French, take up its station in the neighbourhood of the Dardanelles.

So long as the negotiation bore an amicable character Her Majesty refrained from any demonstration of force. But when, in addition to the assemblage of large military forces on the frontier of Turkey, the Ambassador of Russia intimated that serious consequences would ensue from the refusal of the Sultan to comply with unwarrantable demands, Her Majesty deemed it right, in conjunction with the Emperor of the French, to give an unquestionable proof of Her determination to support the Sovereign rights of the Sultan.

The Russian Government has maintained that the determination of the Emperor to occupy the Principalities was taken in consequence of the advance of the Fleets of England and France. But the

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menace of the invasion of the Turkish territory was conveyed in Count Nesselrode's Note to Reshid Pacha, of the  $\frac{1}{2}$  May, and re-stated in his Despatch to Baron Brunnow, of the  $\frac{20 \text{ May}}{1 \text{ June}}$ , which announced the determination of the Emperor of Russia to order his troops to occupy the Principalities, if the Porte did not within a week comply with the demands of Russia.

The Despatch to Her Majesty's Ambassador, at Constantinople, authorizing him in certain specified contingencies to send for the British Fleet, was dated the 31st of May, and the order sent direct from England to Her Majesty's Admiral to proceed to the neighbourhood of the Dardanelles, was dated the 2nd of June.

The determination to occupy the Principalities was therefore taken before the orders for the advance of the combined squadrons were given.

The Sultan's Minister was informed that unless he signed within a week, and without the change of a word, the Note proposed to the Porte by Prince Menchikoff, on the eve of his departure from Constantinople, the Principalities of Moldavia and Wallachia would be occupied by Russian Troops. The Sultan could not accede to so insulting a demand; but when the actual occupation of the Principalities took place, the Sultan did not, as he might have done in the exercise of his undoubted right, declare war, but addressed a Protest to his Allies.

Her Majesty, in conjunction with the Sovereigns of Austria, France, and Prussia, has made various attempts to meet any just demands of the Emperor of Russia without affecting the dignity and independence of the Sultan; and had it been the sole object of Russia to obtain security for the enjoyment by the Christian subjects of the Porte of their privileges and immunities, she would have found it in the offers that have been made by the Sultan. But as that security was not offered in the shape of a special and separate stipulation with Russia, it was rejected. Twice has this offer been made by the Sultan, and recommended by the Four Powers, once by a note originally prepared at Vienna, and subsequently modified by the Porte, once by the proposal of bases of negotiation agreed upon at Constantinople on the 31st of December, and approved at Vienna on the 13th of January, as offering to the two parties the means of arriving at an understanding in a becoming and honourable manner.

It is thus manifest that a right for Russia to interfere in the ordinary relations of Turkish subjects to their Sovereign, and not the happiness of Christian communities in Turkey, was the object sought for by the Russian Government; to such a demand the Sultan would not submit, and His Highness, in self-defence, declared war upon Russia, but Her Majesty, nevertheless, in conjunction with Her Allies, has not ceased her endeavours to restore peace between the contending parties.

The time has, however, now arrived when the advice and remonstrances of the Four Powers having proved wholly ineffectual, and the military preparations of Russia becoming daily more extended, it is but too obvious that the Emperor of Russia has entered upon a

## INTRODUCTION.

course of policy which, if unchecked, must lead to the destruction of the Ottoman Empire.

In this conjuncture, Her Majesty feels called upon by regard for an Ally, the integrity and independence of whose empire have been recognised as essential to the peace of Europe, by the sympathies of Her people with right against wrong, by a desire to avert from Her dominions most injurious consequences, and to save Europe from the preponderance of a Power which has violated the faith of Treaties, and defies the opinion of the civilised world, to take up arms in conjunction with the Emperor of the French, for the defence of the Sultan.

Her Majesty is persuaded that in so acting she will have the cordial support of Her people; and that the pretext of zeal for the Christian religion will be used in vain to cover an aggression undertaken in disregard of its holy precepts, and of its pure and beneficent spirit.

Her Majesty humbly trusts that Her efforts may be successful, and that, by the blessing of Providence, peace may be re-established on safe and solid foundations.

*Westminster, March 28, 1854.*

## DECLARATION.

HER Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an Ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

Property of  
Neutrals on  
board ene-  
my's ships. To preserve the *commerce of neutrals* from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to Her by the law of nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, *unless it be contraband of war.*

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships, and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her *present* intention to issue letters of marque for the commissioning of privateers.

*Westminster, March 28, 1854.*

At the Court at *Buckingham-Palace*, the 29th day of *March*, 1854.  
Present, The QUEEN'S Most Excellent Majesty in Council.

HER Majesty, having determined to afford active assistance to Her Ally, His Highness the Sultan of the Ottoman Empire, for the protection of His dominions against the encroachments and unprovoked aggression of His Imperial Majesty, the Emperor of all the Russias, Her Majesty, therefore, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that *general reprisals* be granted General re-  
against the ships, vessels, and goods of the Emperor of all the Russias, *prisals*.  
and of his subjects, or others inhabiting within any of his countries, territories, or dominions, so that Her Majesty's fleets and ships shall and may lawfully seize all ships, vessels, and goods belonging to the Emperor of all the Russias, or his subjects, or others inhabiting within any of his countries, territories or dominions, and bring the same to judgment in such Courts of Admiralty within Her Majesty's dominions, possessions, or colonies, as shall be duly commissioned to take cognizance thereof. And to that end, Her Majesty's Advocate-General, with the Advocate of Her Majesty in Her Office of Admiralty, are forthwith to prepare the draft of a *Commission*, and present the same to Her Majesty at this Board, authorising the Commissioners for executing the office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and judge of the said Court, his Prize  
arrogate or Surrogates, as also the several Courts of Admiralty within Courts.  
Her Majesty's dominions, which shall be duly commissioned to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods, that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty and the Law of Nations, to judge and condemn all such ships, vessels, and goods, as shall belong to the Emperor of all the Russias or his subjects, or to any others inhabiting within any of his countries, territories, or dominions: and they are likewise to prepare and lay before Her Majesty, at this Board, a Draft of such Instructions as may be proper to be sent to the said several Courts of Admiralty in Her Majesty's dominions, possessions, and colonies, for their guidance herein.

From the Court at Buckingham-Palace, this twenty-ninth day of March, one thousand eight hundred and fifty-four.

CRANWORTH, C.  
GRANVILLE, P.  
ARGYLL, C. P. S.  
NEWCASTLE.  
BREADALBANE  
LANSDOWNE.  
ABERCORN.  
ABERDEEN.  
CLARENDON.

DRUMLANRIG.  
MULGRAVE.  
J. RUSSELL.  
ERNEST BRUCE.  
SYDNEY HERBERT.  
J. R. G. GRAHAM.  
STEPHEN LUSHINGTON.  
W. E. GLADSTONE.  
WILLIAM MOLESWORTH.



At the Court at Buckingham Palace, the 29th day of March, 1854.  
Present, The Queen's Most Excellent Majesty in Council.

It is this day ordered by Her Majesty, by and with the advice of Her Privy Council, that no ships or vessels belonging to any of Her Majesty's subjects, be permitted to enter and clear out for any of the ports of Russia, until further order; and Her Majesty is further pleased to order, that a *general embargo* or stop be made of all Russian ships and vessels whatsoever, now within or which shall hereafter come into any of the ports, harbours, or roads, within any of Her Majesty's dominions, together with all persons and effects on board the said ships or vessels: provided always, that nothing herein contained shall extend to any ships or vessels specified or comprised in a certain Order of Her Majesty in Council, dated this twenty-ninth day of March, for exempting from capture or detention Russian vessels under special circumstances; and Her Majesty is pleased further to order, and it is hereby ordered, that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage or embezzlement whatever be sustained; and the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

Embargo on  
Russian  
vessels.

C. C. GREVILLE.

At the Court at Buckingham-Palace, the 29th day of March, 1854.  
Present, The QUEEN'S Most Excellent Majesty in Council.

HER Majesty being compelled to declare War against His Imperial Majesty, the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within Her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of Her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term. Provided, that nothing herein contained shall extend, or be taken to extend, to Russian vessels having on board any officer in the Military or Naval Service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by Her Majesty, by and with the advice of Her Privy Council as aforesaid, that any Russian Merchant

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And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions therein as to them may respectively appertain.

C. C. GREVILLE.

## VICTORIA R.

### Distribution of prizes.

Whenever any prize shall be taken by any of Our fleets, squadrons, ships, or vessels of war, whilst acting in conjunction with any fleet, squadron, ships, or vessels of war belonging to any other Power or Powers in alliance with Us, Our High Court of Admiralty, or the Vice-Admiralty Court within Our dominions adjudicating thereon, shall apportion to such Ally or Allies, a share or shares of the proceeds of such prize or prizes, proportionate to the number of officers and men, &c., present and employed on the part of such Ally or

Allies, as compared with the number of officers and men, &c. present and employed on Our behalf in such capture or captures, without reference to their respective ranks; and the share or shares so set apart for such Ally or Allies, shall be transmitted to such persons as may be duly authorised on behalf of such Ally or Allies to receive the same.

Ships or vessels being in sight of the prize, as also of the captor, under circumstances to cause intimidation to the enemy and encouragement to the captor, shall be alone entitled to share as joint captors.

After having deducted the portion set apart as aforesaid for Our Allies, a distribution, so far as regards Her Majesty's Forces, shall be as follows:

The flag officer or officers shall have one twentieth part of the whole nett proceeds arising from prizes captured from the enemy, by any of the ships or vessels under his or their command, and of the rewards conferred for the same, according to the following conditions and modifications, save and except as hereinafter provided and directed, that is to say:

When there is but one flag officer, he shall have the entire *one-twentieth part*; when two flag officers shall be sharing together, the chief shall have two-thirds, and the other flag officer shall have the remaining one-third of the one-twentieth part; and when there shall be more than two flag officers, the chief shall have one half of the said one-twentieth part, and the remaining half shall be equally divided among the junior flag officers; commodores of the first class and captains of the fleet to share as flag officers: provided always that no flag officer, unless actually on board any of Our ships or vessels of war, and at the actual taking, sinking, burning, or otherwise destroying any ship or ships of war, privateer or privateers, belonging to the enemy, shall share in the distribution of any head money or bounty money granted as a reward for taking, sinking, burning, or otherwise destroying any such ship or vessel of the enemy.

That no flag officer commanding in any port in the United Kingdom shall share in the proceeds of any prize captured from the enemy, by any ship or vessel which shall sail from or leave such port by order of the Lord High Admiral, or of Our Commissioners for executing the Office of Lord High Admiral.

That when ships or vessels under the command of several flag officers belonging to separate stations shall be joint captors, each flag officer shall receive a proportion of the one-twentieth part according to the number of officers and men present under the command of each such flag officer; and when any ship or vessel under orders from the Lord High Admiral, or from Our Commissioners for executing the Office of Lord High Admiral, are joint captors with other ships or vessels, under a flag or flags, the like regulations as to the apportionment of the flag share to the flag officer or officers is to be observed.

With reference to flag officers, it is to be noted: that when an inferior flag officer is sent to reinforce a superior officer on any station, the superior flag officer shall not share in any prize taken by the in-

inferior flag officer before he has arrived within the limits of that station, unless the inferior officer shall have received some order directly from, and shall be acting in execution of some order issued by, such superior flag officer.

No chief flag officer quitting any station, except upon some definite urgent service, and with the intention of returning to the station as soon as such service is performed, shall share in any prize taken by Our ships or vessels left behind, after he has passed the limits of the station, or after he has surrendered the command to another flag officer appointed by the Admiralty to command in chief upon such station.

An inferior flag officer quitting any station (except when detached by orders from his commander-in-chief upon a special service, accompanied with orders to return to such station as soon as the service has been performed), shall have no share in prizes taken by the ships and vessels remaining on the station, after he has passed the limits hereof. In like manner, flag officers remaining on such station shall not share in the prizes taken by such inferior officer, or by ships or vessels under his immediate command, after he has quitted the limits of the station, except he has been detached as aforesaid.

A commander-in-chief or other flag officer belonging to any station shall not share in any prize or prizes, taken out of the limits of that station by any ship or vessel under the command of a flag officer of any other station, or under orders from Our Commissioners of the Admiralty, unless such commander-in-chief or flag officer is expressly authorised by Our said Commissioners to take the command of that station in which the prize or prizes is or are taken, and shall actually have taken upon him such command.

Every commodore having a captain under him shall be esteemed a flag officer with respect to the twentieth part of prizes taken, whether he be commanding in chief or serving under command.

The first captain to the admiral and commander-in-chief of Our fleet, and also the first captain to any flag officer appointed to command a fleet of ten ships of the line or upwards, shall be deemed to be a flag officer for the purpose of sharing in prize, and shall be entitled to share therein as the junior flag officer of such fleet.

Any officer on board any of Our ships of war at the time of capturing any prize or prizes, who shall have more commissions than one, shall be entitled only to share in such prize or prizes according to the share allotted to him by the above-mentioned distribution in respect to his superior commission or office.

And with reference to other officers it is to be noted :—that a captain, commander, or other commanding officer of a ship or vessel, shall be deemed to be under the command of a flag, when he shall have received some order from, or be acting in the execution of some order issued by, a flag officer, whether he be, or be not within the limits of the station of such flag officer ; and in the event of his being directed to join a flag officer on any station he shall be deemed to be under the command of such flag officer from the time when he arrives within the limits of the station, which circumstance is always to be carefully noted in the log book ; and it shall be considered that he

## INTRODUCTION.

continues under the flag officer of such station, until he shall have received some order directly from or be acting in the execution of some order issued by some other flag officer, duly authorised, or by the Lord High Admiral, or Our Commissioners for executing the Office of Lord High Admiral.

And We hereby direct, that the captain, commander, lieutenant commanding, master commanding, or any other officer, duly commanding any ship, sloop or vessel of war, singly taking any prize from the enemy, that is to say, the officer actually in command at the time, shall have one-eighth of the remainder, or if there is no flag, one-eighth of the entire nett proceeds, except that if the single capturing ship be a rated ship, having a commander under the captain, the commander shall take a portion of the one-eighth part, as if he were commander of a sloop, according to the proportion hereinafter set forth; and if more than one commanding officer of the same rank of command shall be entitled to share as joint captors, the one-eighth shall be equally divided between them; but when captains, commanders, lieutenants commanding, and masters commanding respectively Our ships and vessels of war, and commanders under captains in rated ships shall share together in whatever variety of combination, the one-eighth shall be so divided into parts for a graduated apportionment as to provide for each captain receiving six parts; each commander of a sloop, or commander under a captain in a rated ship, three parts; and each lieutenant commanding, or master commanding, or other officer actually commanding a small vessel of war, two parts; which We hereby direct shall be the proportion in which they shall respectively share: commodores of the second class and field officers of marines, or of land forces serving as marines, doing duty as field officers, above the rank of major to share as captains; and field officers of marines, or of land forces serving as marines, and doing duty in the rank of major, to share as commander of sloops.

And we further direct, that after provision shall thus have been made for the flag share (if any) and for the portion of the commanding officer or officers, and others, as above specified, the remainder of the nett proceeds shall be distributed in ten classes, so that each officer, man, and boy, composing the rest of the complements of Our ships, sloops, and vessels of war, and actually on board at the time of any such capture, and every person present and assisting, shall receive shares or a share according to his class, as set forth in the following scale:—

First Class.—Master of the fleet, inspector of steam machinery afloat, when embarked with a fleet, medical inspector, or deputy medical inspector, when embarked with a fleet, forty-five shares each.

Second Class.—Senior lieutenants of a rated ship, not bearing a commander, under the captain, secretary to the admiral of the fleet or admiral commanding in chief:—Thirty-five shares each.

Third Class.—Sea lieutenant, master, captain of marines, of marine artillery, or of land forces doing duty as marines, whether having higher brevet rank or not, secretary to an admiral, or to a commodore of the first class, not commanding in chief, chief engineer:—Twenty-eight shares each.

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**Fourth Class.**—Lieutenant or quartermaster of marines, lieutenant of marine artillery, lieutenant, quartermaster, or ensign, of land forces doing duty as marines, secretary to a commodore of the second class, chaplain, surgeon, paymaster, naval instructor, mate, assistant-surgeon, second master, clerk in charge, passed clerk, assistant engineer, gunner, boatswain carpenter :—Eighteen shares each.

**Fifth Class.**—Midshipman, master's assistant pilot clerk (not passed), master-at-arms, chief gunner's mate, chief boatswain's mate, chief carpenter's mate, chief captain of the forecastle, admiral's coxswain, chief quartermaster, seaman's schoolmaster, ship's steward, ship's cook :—Ten shares each.

**Sixth Class.**—Naval cadets, clerk's assistant, captain's coxswain, ship's corporal, quartermaster, gunner's mate, boatswain's mate, captain of the forecastle, captain of the afterguard, captain of the hold, captain of the maintop, captain of the foretop, coxswain of the launch, sailmaker, ropemaker, caulker, leading stoker, blacksmith, sergeant of marines, of marine artillery, or of land forces doing duty as marines :—Nine shares each.

**Seventh Class.**—Captain of the mast, captain of the mizentop, yeomen of the signals, coxswain of the barge, coxswain of the pin-nace, coxswain of the cutter, second captain of the forecastle, second captain of the maintop, second captain of the foretop, second captain of the afterguard, sailmaker's mate, caulker's mate, musician, cooper, armourer, corporal of marines or of land forces doing duty as marines, bombardier of marine artillery, head krooman :—Six shares each.

**Eighth Class.**—Leading seamen, shipwright, second captain of the hold, able seaman, carpenter's crew, sailmaker's crew, cooper's crew, armourer's crew, yeoman of the store-rooms, steward's assistant, ordinary seaman, blacksmith's mate, private and fifer of marines, or of land forces doing duty as marines, gunner of marine artillery, painter, stoker, coal-trimmer, second head krooman, sick berth attendant, bandsman, tailor, butcher :—Three shares each.

**Ninth Class.**—Cook's mate, ship's steward's boy, admiral's domestic, superintendent's domestic, admiral's steward and cook, captain's steward and cook, wardroom and gunroom steward and cook, subordinate officer's steward and cook, commander's servant, secretary's servant, second class ordinary seaman, assistant stoker, barber, boy of the first class, first and second class krooman, supernumeraries, except as hereinafter provided, persons borne merely as passengers, and not declining to render assistance on occasion of capture :—Two shares each.

**Tenth Class.** :—Boy below first class :—One share.

All supernumeraries holding ranks in the service above the ranks or ratings specified in the fifth class of this Our Proclamation, who have been ordered to do duty in any of Our ships or vessels, by the Lord High Admiral, or by Our Commissioners for executing the Office of Lord High Admiral, by the senior officer of the fleet or squadron, or if none senior, then by the captain or commanding officer of the capturing ship or vessel, if not by special authority employed in higher capacities, shall share according to the rank which they

## INTRODUCTION.

respectively hold in the service ; but in all cases to qualify them for so sharing, and not merely as supernumeraries in the ninth class, due notation of their being thus respectively ordered to do duty must have been made on the muster-books.

And with respect to supernumeraries of ratings in the service, below the denominations of those specified in the fourth class of this Our Proclamation, and who at full victuals are engaged in the ordinary duties of the ship, it is Our will and pleasure that they shall always share according to the ratings which they bear in the service.

And, in order that Our Royal intentions herein may be duly carried into effect, We further direct that when any capture is made from the enemy, the captains or commanding officers of Our ships or vessels of war making the same shall transmit, or cause to be transmitted, as soon as may be, to the Secretary to the Admiralty, a true and perfect list of all the officers, seamen, and marines, soldiers and others, who were actually on board on the occasion, accompanied by a separate list, containing the names of those belonging to the crew who were absent on duty or otherwise at the time, specifying the cause of such absence, each list to contain the quality of the service of each person, together with the respective descriptions of men, taken from the description book of the ship or vessel, and their several ratings, to be subscribed by the captain or commanding officer, and three or four more of the chief officers on board.

And when the list of those actually on board, and the separate list of persons absent, though belonging to the ship or vessel, shall have been verified, on examination with the muster books lodged as official records, the Accountant-General of Our Navy shall, upon request, grant to the agent or agents, nominated or appointed by the captors, a certificate that such lists are correct, or have been corrected, as occasion may require, in order that distribution of the prize or other proceeds may be duly made.

And in the event of difficulty arising with respect to any of the regulations hereby ordered, or if any case should occur not herein provided for, or not sufficiently provided for, We are pleased hereby to authorize the Lord High Admiral, or Our Commissioners for executing the Office of Lord High Admiral, for the time being, to issue such directions thereupon as may appear just and expedient, which directions shall have the same force and effect as if specially provided for in this Our Royal Proclamation.

Given at Our Court at Buckingham Palace, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventeenth year of Our reign.

GOD save the QUEEN.

At the Council-Chamber, Whitehall, the 11th day of April, 1854.

By the Lords of Her Majesty's Most Honourable Privy Council.

THE Lords of the Council having taken into consideration certain applications for leave to export arms, ammunition, military and naval stores, &c., being articles of which the exportation is prohibited by Her Majesty's Proclamation of February eighteenth, one thousand eight hundred and fifty-four; their Lordships are pleased to order, and it is hereby ordered, that permission should be granted by the Lords Commissioners of Her Majesty's Treasury to export the articles so prohibited to be carried coastwise to ports in the United Kingdom and likewise to all places in North and South America, except the Russian possessions in North America; to the coast of Africa, West of the Straits of Gibraltar, and round the South and East coast of Africa; to the whole coast of Asia not within the Mediterranean Sea or the Persian Gulf, and not being part of the Russian territories; to the whole of Australia, and to all British colonies within the limits aforesaid, upon taking a bond from the persons exporting such prohibited articles that they shall be landed and entered at the port of destination; and that all further permission to export such articles to other parts of the world be only granted upon application to the Lords of the Council at this Board.

Exportation  
of arms, &c.

C. C. GREVILLE.

At the Court at Windsor, the 15th day of April, 1854. Present,  
The QUEEN'S Most Excellent Majesty in Council.

WHEREAS Her Majesty was graciously pleased, on the twenty-eighth day of March last, to issue Her Royal Declaration in the following terms:

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up Arms in support of an Ally, is desirous of rendering the War as little onerous as possible to the Powers with whom she remains at Peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to Her by the law of nations.

"It is impossible for Her Majesty to forego the exercise of Her Right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not



Her present intention to issue letters of marque for the commissioning of privateers."

Property  
under a neu-  
tral flag.

Now it is this day ordered, by and with the advice of Her Privy Council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in Her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in Her Majesty's dominions to any port not blockaded, any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong.

And Her Majesty is further pleased, by and with the advice of Her Privy Council, to order, and it is hereby further ordered, that, save and except only as aforesaid, all the subjects of Her Majesty and the subjects or citizens of any neutral or friendly State shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever, either under or by virtue of this Order, or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of Her Majesty's enemies.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, the Lord Warden of the Cinque Ports, and Her Majesty's Principal Secretary of State for War and the Colonies, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

At the Court at Windsor, the 15th day of April, 1854. Present,  
The QUEEN's Most Excellent Majesty in Council.

WHEREAS by an Order of Her Majesty in Council, of the twenty-ninth of March last, it was amongst other things ordered, "that any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And whereas Her Majesty, by and with the advice of Her said Council, is now pleased to alter and extend such part of the said Order, it is hereby ordered, by and with such advice as aforesaid, as follows; that is to say:—that any Russian merchant vessel which, prior to the fifteenth day of May, one thousand eight hundred and fifty-four, shall have sailed from any port of Russia, situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her

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Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And Her Majesty is pleased, by and with the advice aforesaid, further to order, and it is hereby further ordered, that in all other respects Her Majesty's aforesaid Order in Council, of the twenty-ninth day of March last, shall be and remain in full force, effect, and operation.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.



# THE SHIPPING LAWS OF THE BRITISH EMPIRE.

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## CHAPTER I.

## CHAP. I.

### POLICY.

is the name given to the instrument by which the indemnity is effected between the insurer and insured; and it, like most contracts, signed by both parties, but only insurer, who on that account, it is supposed, is denominated *underwriter*. Notwithstanding this, there are certain conditions, which we shall hereafter have occasion to speak of, to be performed by the person not subscribing, as by the underwriter, otherwise the policy will be void. Of policies there seems to be two kinds of, valued and open policies; and the only difference between them is this, that in the former, goods or property insured are at prime cost, at the time of effecting the policy; in the latter the value is not mentioned: that in the case of an open policy the compensation must be ascertained by evidence: in a valued policy, the agreed total value is conclusive; each party having conclusively admitted that this fixed sum shall be that to which the assured is entitled to receive, in case of a total loss. A policy of insurance is commonly called a contract of *indemnity*. Character of contract of indemnity; but such a description must be taken of. It is a qualification, that the parties may agree beforehand in settling the value of what is insured by way of liquidated damages.<sup>a</sup>

A policy may be not worded as the parties to it really intended, the Reform of law may, on proper proof, be rectified, in a Court of *Equity*; after the loss has happened.<sup>b</sup> In a Court of *Law*, the interpretation of the policy is conclusive; no parol evidence being there admissible to contradict or vary it.<sup>c</sup>

<sup>a</sup> *Ing v. Manning*, 6 C. B. 391.

<sup>b</sup> *Kaines v. Knightley*, Skin. 54;

*Kle v. R. E. A. Co.*, 1 Vez. 317; *Weston v. Emes*, 1 Taunt. 115.

*v. L. A. Co.*, 1 Atk. 545.

*Part on Insurance.*

Alteration,  
effect of.

*A contemporaneous slip is deemed a part of the policy itself.<sup>a</sup>*

It has often happened, and may often happen again, that an alteration has been made in the policy, whilst it was *in fieri*, and at times, even after subscription. Now, an alteration of a written contract is of two kinds,<sup>b</sup> that is to say, material or immaterial; in other words, it either introduces new matter increasing the risk,<sup>c</sup> or it does not.<sup>d</sup> A material alteration unauthorised, avoids the policy; an immaterial alteration does not affect it. The assent of the underwriter is usually expressed by his initials opposite the new matter; but it may be so, by a memorandum indorsed on the policy itself, or by a separate writing.<sup>e</sup> The underwriter may thus estop himself from taking the objection of alteration. It is, so far, a new contract, that the declaration need not notice the original stipulation; he has made the altered instrument his own.<sup>f</sup> Though estopped, by his written assent, from objecting to the alteration, as such, the underwriter is not thereby estopped from saying that the policy is not binding on him, by reason of the *Stamp Acts*.<sup>g</sup> The statute law does not, I should observe, prohibit an alteration after the policy is underwritten, nor require any additional stamp-duty, by reason of such alteration, if such alteration be made before notice of the determination of the risk originally insured,<sup>h</sup> and the premium exceed the rate of 10s. per cent. on the sum insured; and so that the thing insured shall remain the property of the same person;<sup>i</sup> and so that such alteration shall not prolong the term insured beyond the period of twelve calendar months; and if no additional or further sum shall be insured by reason or means of such alteration.

Property in  
Policy.

A policy of insurance is but a *chose in action*; and does not pass merely by an assignment of the ship.<sup>k</sup> When effected, it becomes the property of the insured; and if it be wrongfully withheld, either by the broker employed by him to effect it, or by any other person to whose hands it may happen to come, he may maintain an action for it, as well as for any other species of property. Thus an action of trover was brought against the defendants for two policies of insurance. The defendants were brokers, who had written to the plaintiff, the master of a vessel, that they had got two policies effected; the one on account of the plaintiff's clothes and wages, the other on account of the owners, and that the underwriter was Mr. Newnham. A loss having happened, the defendants produced a policy, underwritten by one J. S., only insuring the ship, in which the plaintiff had no interest. Lord Mansfield.—“I shall consider the defendants as the actual insurers, and therefore the plaintiff must prove his interest and loss.” The defence set up was, that the letter above stated in evidence was written by the de-

<sup>a</sup> Heath v. Durant, 11 M. & W. 440.

<sup>b</sup> See Master v. Miller, 1 Smiths L. C. 457.

<sup>c</sup> Langhorn v. Cologan, 4 Taunt. 330; Fairlie v. Christie, 7 Taunt. 419; Forshaw v. Chabert, 3 B. & B. 158.

<sup>d</sup> Sanderson v. Symonds, 1 B. & B. 426.

<sup>e</sup> See Reed v. Deere, 7 B. & C. 261.

<sup>f</sup> Robinson v. Tobin, 1 Stark. 336.

<sup>g</sup> 35 Geo. 3, c. 63, s. 13; 7 & 8 Vict. c. 21.

<sup>h</sup> Kensington v. Inglis, 8 East, 290; Ramstrom v. Bell, 5 M. & S. 267; Brockelbank v. Sugrue, 1 B. & Ad. 81.

<sup>i</sup> Hill v. Patten, 8 East, 375.

<sup>k</sup> Powles v. Innes, 11 M. & W. 13.

fendants' clerk through mistake; and it was said, that trover could not be maintained for that which never existed: but his Lordship would not suffer the defendants now to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, the premium being deducted.<sup>a</sup> CHAP. I.

It is material to observe, that policies of insurance, though called written instruments, are, for the convenience of trade, and the dispatch of business, generally printed, leaving blanks for the insertion of names and all other requisites. This being the case, it is frequently necessary to insert written clauses, in order to express the meaning of the parties to the contract, which, from some particular circumstances, the printed form may not sufficiently explain. These written clauses and conditions, thus inserted, are to be considered as the real contract; the court will look to them to find out the intention of the parties, and will consequently suffer such conditions to control the printed words in policies of insurance.<sup>b</sup> Written clauses.

Having premised thus much of policies in general, it may be proper to consider this subject in a threefold point of view: 1, what persons may be insurers; 2, what things may be insured; 3, what the requisites of a policy are.

1. *What persons may be insurers.* It should seem, that, by the common law and usage of merchants, any person whatever might be an insurer, however unable he might be, from poverty, to make up the losses insured against, provided the merchant was weak enough to trust to such a security. In process of time, however, there were so many who made a show of great wealth, in order to deceive the honest and unsuspecting trader out of his premiums, and who were in insolvent circumstances, that it became an object of national concern and parliamentary interference. With this object, the 6 Geo. 1, c. 18, restrained all other corporations or bodies politic, except those to be thereby chartered (*The Royal Exchange Assurance* and *The London Assurance*), and all societies or partnerships, or persons acting in any society or partnership, from effecting marine insurances; and lending money on bottomry. But this was repealed by the 5 Geo. 4, c. 114. So that, in this respect, the common law prevails, as before. It has recently been decided that the 35 Geo. 3, c. 68, s. 11, does not require the name of every individual underwriter constituting the assuring firm to be expressed in the policy.<sup>c</sup> Who may be insurers.

2. *What things may be insured.* I beg leave here to premise, that I do not mean, at present, to go into the question of insurance, upon interest or no interest, having reserved that for the subject of a distinct chapter. My design, in this place, is only to show what kinds of property are the subject of insurance, upon the supposition that every person making insurance is interested in the goods, as the law requires. What may be insured.

<sup>a</sup> *Harding v. Carter*; Sitt. at Guildh. E. vac. 1781.

<sup>b</sup> See *Robertson v. French*, 4 East, Rep. 130; *post*, Ch. II.

<sup>c</sup> *Reid v. Allen*, 4 Exch. 335; see also *Hallett v. Dowdall*, 21 L. J. Q. B.

99. As to power of *Directors* to bind *shareholders* of a registered company, and to insert a clause making the funds alone responsible. *Halket v. The M. T. Ass.*, 13 Q. B. 960.

Part on Insurance.

The most frequent subjects of marine insurance are ships, goods, merchandises, the freight<sup>a</sup> or hire<sup>b</sup> of ships, profits to arise from the sale of goods (in which the insurer has a present interest<sup>c</sup>), passage-money,<sup>d</sup> a lien on goods,<sup>e</sup> and the like. But although insurances upon such property as we have just enumerated, most frequently occur in practice, yet in the law-books we meet with cases which can hardly fall within any of those descriptions.<sup>f</sup> Thus *bottomree* and *respondentia* are a particular species of property which may be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for, under a general insurance on goods, the party insured cannot recover money lent on bottomree.<sup>g</sup> Such has been, and is, at this day, the established usage of merchants. But money expended by the captain for the use of the ship, and for which *respondentia* interest was charged, may be recovered under an insurance on goods, specie, and effects, provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it.<sup>h</sup>

Policy on seamen's wages.

By the marine regulations of most, if not of all, the trading powers in Europe, insurances upon the wages of seamen are forbidden;<sup>i</sup> a regulation founded in wisdom and sound policy. It is also the spirit of the *British* law expressed in the *ship's articles*,<sup>k</sup> and, above all, in making wages depend, as they generally do, on the earning of freight. The sailors are thereby interested in the return of the ship; they will, on that account, be prevented from deserting it when abroad, from leaving it unmanned, and in times of danger, arising either from perils of the sea, or the attacks of an enemy, will be more anxious for its preservation. But these good effects would be entirely defeated, if insurance on their wages, or upon any commodity which they are to receive at the end of the voyage in lieu of wages,<sup>l</sup> were to be permitted; for to whatever cause the loss might be attributed, they would still be secure. However, it should seem that this regulation does not mean to prevent mariners from insuring those wages which they are intitled to receive abroad, or goods which they have purchased with those wages in order to bring them home; but, in such a case, they are to be considered in the same light with other men.<sup>m</sup> Again, these prohibitions do not extend to the *masters* of ships; and therefore it has been held that an insurance on the commission, privileges, &c., of the captain of a ship in the African trade was legal.<sup>n</sup>

<sup>a</sup> *Flint v. Fleming*, 1 B. & Ad. 48; *Chapman v. Benson*, 8 C. B. 950.

<sup>b</sup> See *Ellis v. Lafone*, 8 Exch. 554, a part of freight advanced. *Winter v. Haldimand*, 2 B. & Ad. 649.

<sup>c</sup> *Stockdale v. Dunlop*, 6 M. & W. 232. *M'Swiney v. Royal Exch. Ass. Co.*, 14 Q. B. 660. The ship's earnings, or the profit which an owner derives from carrying his own goods in his own ship, may be insured under the name of freight. 1 B. & Ad. 48; and *Devaux v. Janson*, 5 N. C. 519.

<sup>d</sup> 15 & 16 Vict. c. 44, s. 51.

<sup>e</sup> *Briggs v. Merchant Traders' Ass.*, 13 Q. B. 167.

<sup>f</sup> See *Stainbank v. Fenning*, 11 C. B. 51, affd. in Error; and *post*, Ch. XIV. and XV.

<sup>g</sup> *Glover v. Black*, 3 Burr. 1394.

<sup>h</sup> *Gregory v. Christie*, 3 Dougl. 419, *dist.* *Stainbank v. Fenning*, 11 C. B. 89.

<sup>i</sup> 1 Magens, 18; *Code de Commerce*, b. 2, tit. 10, s. 1.

<sup>k</sup> 7 & 8 Vict. c. 112.

<sup>l</sup> *Webster v. De Tastet*, 7 T. R. 157.

<sup>m</sup> *Carter v. Boehm*, 3 Burr. 1905.

<sup>n</sup> *King v. Glover*, 2 N. R. 206.

An opinion seems to have prevailed, that a shipowner could not recover from an underwriter the value of goods *stowed on deck*; such a mode of stowage being looked upon as calculated to obstruct the management of the vessel, and increase the risk of navigation. But it is now clear that if such a mode of stowage be conformable to the usage of the trade, the underwriter is liable on the policy. Deck stowage is one thing, improper stowage is another.<sup>a</sup> Deck stowage is, however, sometimes expressly prohibited by Act of Parliament, as by *The Customs' Consolidation Act*, 1853 (16 & 17 Vict. c. 107, s. 171): in that case the policy would be void.

3. *Of the requisites of a policy.* The form of a policy, now used in London, is nearly the same which was adopted 200 years ago, as may be collected from Malyne;<sup>b</sup> but its antiquity cannot preserve it from just censure, it being very irregular and confused, and frequently ambiguous, from making use of the same words in different senses. The essentials in the contract of insurance are: 1, the name of the person for whom the insurance is made; 2, the names of the ship and master; 3, whether they are ships, goods, or merchandises, upon which the insurance is made; 4, the name of the place where the goods are laden, and whither they are bound; 5, the time when the risk begins, and when it ends; 6, all the various perils and risks which the insurer takes upon himself; 7, the consideration, or premium, paid for the risk or hazard run; 8, the month, day, and year, on which the policy is executed; 9, the stamps required by Act of Parliament. Of each of these in their order.

1. *Of the name of the person insured.* It was formerly very much the practice to effect policies of insurance in blank, as it was called, that is, without specifying the names of the persons for whose use and benefit, or on whose account, such insurances were made; a practice which had been found in many respects to be mischievous, and productive of great inconveniences. These evils were remedied at a very early period in Genoa and France by the marine ordinances of those countries, which required the name of the person insured to be inserted in the policy, and whether he was to be considered in the capacity of principal or factor.<sup>c</sup> In England a similar regulation took place in the year 1774,<sup>d</sup> with respect to insurances upon lives; but it was not till the year 1785 that any provision was made for this evil in policies upon ships and merchandises. This was done by the 25 Geo. 3, c. 44; but it was repealed by the 28 Geo. 3, c. 56: this declares that it shall not be lawful to effect any policy upon any ship, without first inserting in such policy the name or names<sup>e</sup> or the usual style and firm of dealing of one or more of the persons interested in such insurances; or without, instead thereof, first inserting or causing to be inserted in such policy or policies of insurance, the name or names of the usual style and firm of dealing of the consignor or consignors, consignee or con-

<sup>a</sup> *Milward v. Hibbert*, 3 Q. B. 120.

<sup>b</sup> Malyne, 108. 3 Burr. 1555.

<sup>c</sup> 2 *Magens*, 65, 169.

<sup>d</sup> 14 Geo. 3, c. 48.

<sup>e</sup> *Pray v. Edie*, 1 T. R. 313; *Cox v. Parry*, 1b. 464.



Park on Insurance.

signees of the goods so to be insured; or the name or names or the usual style and firm of dealing of the person or persons residing in *Great Britain*, who shall receive the order for and effect such policy; or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy. Moreover, the 35 Geo. 3, c. 63, s. 11, for granting certain *stamp-duties* on sea insurances, declares—that every contract liable to duty under that Act should be deemed a policy of insurance; and that the premium or consideration in the nature of a premium paid, given or contracted for upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters and the sums insured, should be respectively expressed, or specified in or upon such policy; and in default thereof, every such insurance should be null and void, to all intents and purposes whatever. The 55 Geo. 3, c. 184, and the 7 & 8 Vict. c. 21, give other duties, but seem to leave these provisions so far untouched. A subscription, in the name of the partnership firm, is a sufficient compliance with the 35 Geo. 3, c. 63.<sup>a</sup> Upon the 28 Geo. 3, c. 56, it was held not necessary, where a policy was effected by an agent, to add the word *agent*, or any other description to his name, in the policy itself. It has also been decided, that a policy effected by a broker, describing himself therein as *agent*, sufficiently complied with the requisition of that statute. It was presumed, after verdict, that it was proved, that the plaintiffs fell within one or other of the descriptions in the Act.<sup>b</sup> Previous to the passing of the 25 Geo. 3, it was held, that the husband of a ship had no right to insure for any part-owner, without his particular direction; nor for all the owners in general, without their general direction, or something equivalent to it.<sup>c</sup> But if part-owners of a ship be in partnership generally, an order to insure, given by one, binds all.<sup>d</sup>

2. *Of the names of the ship and master.* I do not find any express regulation of this matter in England; but it seems to be necessary, by the law and usage of merchants, to insert the names of the ship and master, in order to fix with precision the bottom upon which the adventure is to be made, and the captain by whose direction the ship is to be navigated, because according to the degree of strength and sufficiency of the one, and the skill, ability and knowledge of the other, the risk is increased or diminished; and so also, probably, will the amount of the premium be regulated. The usage of the merchants of England in this respect is agreeable to the express laws and regulations of other maritime states upon this point.<sup>e</sup> Sometimes, however, there are insurances generally upon any *ship or ships*; and a policy so worded is legal. The assured may apply such a policy to whatever ship he thinks proper, within the terms of it.<sup>f</sup>

<sup>a</sup> Reid v. Allan, 4 Exch. R. 326; Hallett v. Dowdall, 21 L. J. Q. B. 98.

<sup>b</sup> De Vignier v. Swanson, 1 B. & P. 545; Bell v. Gibson, Ib.; Mellish v. Bell, 15 East, 4.

<sup>c</sup> French v. Backhouse, 5 Burr. 2727.

<sup>d</sup> Hooper v. Lusby, 4 Camp. 66.

<sup>e</sup> Code de Commerce, l. 2, tit. 10, s. 1; Ord. of Amsterdam, s. 2.

<sup>f</sup> Henchman v. Offley, 2 H. Bl. 345; Kewley v. Ryan, Ib.

Policies are not unfrequently worded thus : *on board of the good ship called the Amy, whereof was master A. B. for that voyage, or whoever else should go for master in the said ship, or by whatever other name or names the said ship or the master was or should be named or called* : when such general words are used, it becomes a mere question of identity.<sup>a</sup>

It has, indeed, been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss, arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.<sup>b</sup>

3. *Whether they are ships, goods, or merchandises, upon which the insurance is made, is a fact which must be stated.* It is absolutely necessary that there should be a specification upon which of these the underwriter insures ; because, otherwise, it would be impossible to know whether, in any instance, he is liable or not to the loss sustained.<sup>c</sup> But it is another question whether, in policies upon goods, it be necessary to declare the particulars. The practice, I believe, is very unsettled. It is the opinion, however, of a very respectable merchant, that the particulars of goods should be specified, if possible, by their marks, numbers, and packages, rather than that they should be included under the general denomination of merchandise ;<sup>d</sup> or that, if it be agreed to insert them, when known to the insured, care should be taken not to omit it, as such specification prevents much trouble in proving to the insurer the particular goods insured, which are, more or less, subject to damage. But this mode of particularising property is only advisable to be done, or, indeed, can only be done, when the risk commences at home ; because, when goods are coming from abroad, it is better to insure under general expressions on account of the various casualties which may happen to obstruct the purchase of the commodities intended to be sent. It may be proper here to mention that there are certain kinds of merchandise which are of a perishable nature, and liable to early corruption ; on account of which, the underwriters of London have inserted a *memorandum* at the foot of their policy, by which they declare *that in insurances upon corn, fish, salt, fruit, flour, and seed, they will not be answerable for any partial loss, but only for general averages, except the ship be stranded.* That in insurances on sugar, tobacco, hemp, flax, hides, and skins, they consider themselves free from partial losses, not amounting to 5 per cent., and that on all other goods, as well as on the ship and freight, if the partial loss be under 3 per cent., *unless it arise from a general average, or the stranding of the ship,* they also consider themselves discharged. This clause was introduced in the year 1749, in order to prevent the underwriters from being harassed by trifling demands, which must necessarily have arisen from every insurance of this kind, on account of the perishable nature of the cargo.<sup>e</sup> The form of this memorandum

<sup>a</sup> *Le Mesurier v. Vaughan*, 6 East, 381.

<sup>b</sup> *Plantamour v. Staples*, 1 T. R. 611 ;  
and see *Shipton v. Thornton*, 9 Ad. & E.  
322.

<sup>c</sup> *Crowley v. Cohen*, 3 B. & Ad. 478 ;  
*In re Wright*, 1 A. & E. 621.

<sup>d</sup> 1 Mag. 8 ; Code de Commerce, l. 2,  
tit. 10, s. 1.

<sup>e</sup> See *Cocking v. Fraser*, 4 Dougl.  
295 ; *Canillon v. L. A. C.*, 3 Burr.  
1553.

Park on Insurance. was universally used, as well by the two insurance companies as by private underwriters, till the year 1754, when Ld. Ch. J. Ryder ruled, and a special jury, agreeably to his direction, decided, that a ship, having run aground, was a stranded ship within the meaning of the memorandum; and that, although she got off again, the underwriter was liable to an average or partial loss upon damaged corn. This decision induced the two companies (The Royal Exchange Association and The London Association) to alter the memorandum, by striking out the words, 'or the ship be stranded;' so that now they consider themselves liable to no losses which can happen to such commodities, except general averages and total losses. But the old form is still retained by other offices and by private insurers. What shall be considered as losses within the meaning of this memorandum will be the subject of future investigation; my design, at present, being only to enumerate the essentials of a policy, and the reason and origin of them, as far as I have been able to trace them.

There are, however, some kinds of property which do not fall under the general denomination of *goods* in a policy, and for the loss of which the underwriters are not answerable, unless they are specifically named; as goods stowed on deck, where such a mode of stowage is not conformable to the *usage of the trade*,<sup>a</sup> captain's clothes, ship's provisions, and the like.<sup>b</sup>

It is a question, whether a cargo of dollars, or other coin, jewels, &c., if lost, be recoverable under a policy upon *goods* and *merchandises* generally; and I can find no printed case where the question has been at all discussed in *England*.

In one case (*Da Costa v. Firth*<sup>c</sup>) the subject-matter of the insurance was bullion, and the policy was general on goods and merchandises; but no objection was taken on that ground, nor was the point ever argued. By the ordinances of several foreign states, *Middleburg*, *Amsterdam*, *Konigsberg*, and others, it is specially declared that money shall not be recovered under the denomination of goods or merchandise; but the insurance must in the policy be expressed to be upon money to render it valid.<sup>d</sup> The book in which the ordinances above referred to are collected, states explicitly that gold and silver, coined and uncoined, pearls, and other jewels, may be insured at *London* and *Hamburgh*, and several other places, under the general expression of merchandise. Roccus, in his treatise upon insurances, concurs in the latter opinion, and quotes Santerna upon the subject. He draws a distinction, upon the merits of which I do not presume to decide, between money or jewels for the purposes of commerce, which constitute part of the cargo, and such as are merely personal and for private purposes; the former being clearly liable to contribute to a general average, but not the latter. His words are these: "*Assicurans merces in talem navem immissas, intelligitur assecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos in dictâ navi existentes, quæ omnia, appellatione mercium, in navem*

<sup>a</sup> See p. 5.

<sup>b</sup> *Ross v. Thwaite*, cited in *Milward v. Hibbert*, 3 Q. B. 120.

<sup>c</sup> 4 Burr. 1966.

<sup>d</sup> 2 Magena, 71, 89, 131, 182.

immissarum, comprehenduntur, licet expressa non fuissent. Sannerna declarat, quod si pecuniæ, margaritæ et annuli erant destinati ad vendendum vel mercandum alias merces, tunc appellatione mercium veniunt, et in assecuratione comprehenduntur, et loco mercium habentur: vocat dictas res merces, cum occasione earum, habeat locum contributio, sicut aliarum rerum, ne in istis assecurationibus mercatorum potius apices juris, quam veritas observari videantur: et tandem, quia large comprehenduntur omnes res, quæ sunt destinatæ ad negotiandum, et facit etiam, quod confiscatio mercium navis extenditur etiam ad pecuniam numeratam."<sup>a</sup> I forbear to draw any conclusion from these premises, which is the plan I have uniformly adopted where there is no adjudged case upon the question.

4. *The name of the place at which the goods are laden, and to which they are bound.* This has been always held to be necessary in policies, at least for upwards of 200 years; and must be so, on account of the evident uncertainty which would follow from a contrary practice, as the insurer would never know what the risk was which he had undertaken to insure. Molloy has laid down this doctrine, that if a ship be insured from L. to \_\_\_\_\_, (a blank being left by the lader of the goods to prevent a surprise by an enemy,) and if in her voyage she happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty. In support of his opinion, he cites the case of *M. G.*, Gov. of Calais, which was decided by Comms. of Assurance at Rouen against the assured, because, although the bills of lading truly declared the quantity and quality of the goods, the port of the ship's discharge was left a blank, on account of the war which was then existing.<sup>b</sup> Such also is now the law and usage of merchants. It is also customary to state in the policy at what port or places the ship may touch and stay during the voyage, so that it shall not be considered as a deviation to go to any of those places.

5. *The time when the risk commences, and when it ends.* In most of the commercial countries abroad,<sup>c</sup> it is particularly expressed, either in their ordinances or policies, and sometimes in both, that the risk of the insurers shall commence the moment the goods quit the shore, and shall continue till they are landed at the place of their destination; and that the insurer not only runs the risk in the ship named in the policy, but also in all the boats or lighters that shall be employed in carrying the goods aboard, and also in fetching them ashore. But the custom of this country is very different, for the English policies in general expressly declare that "the adventure shall begin upon the said goods and merchandises from the loading thereof on board the said ship, and so shall continue until the said ship, goods, and merchandises shall be arrived at L., and upon the said ship until she hath moored at anchor 24 hours in good safety; and upon the goods, till the same be there safely discharged and landed." From these words it is obvious that insurers are not answerable for any accidents which may happen to the goods in lighters, or boats

<sup>a</sup> Roccus, Not. 17.

<sup>b</sup> Molloy, b. 2, c. 7, s. 14.

<sup>c</sup> Ord. of Antwerp, Amsterdam, Spain,

and Copenhagen; and see Code de Commerce, l. 2, tit. 10, s. 2.

*Park on Insurance.* going abroad, previous to the voyage; yet, as the policy says the risk shall continue till the goods are safely landed, it seems no less obvious, that where ships cannot come close to the quay in order to unload, the insurer continues responsible for the risk to be run in carrying the goods in boats to the shore. If there be a loss, however, in these cases, the accident must have happened while the goods were in the boats or lighters belonging to the ship, or in *public* lighters,<sup>a</sup> for then it is considered as a continuance of the same ship and voyage. I say *public* lighters, because, if the owner bring his own *private* lighter, and receive the goods,<sup>b</sup> or, if the lighter being a *public* one, hired in the usual way, he make such public lighter his own for the time being, as by taking it under his control, the underwriters are thereby discharged.<sup>c</sup>

By the ordinances last referred to, the number of days in which people are obliged to unload their goods is stipulated; but in England no express time is fixed, the owners being left to their own discretion, provided there is no *unreasonable* delay, which must always depend upon circumstances.<sup>d</sup> The risk on the body of a ship, according to the form of the policy received in practice, is to commence, in general, "from her beginning to load at and so shall continue and endure until the said ship shall arrive at and hath there been moored at anchor 24 hours in good safety."<sup>e</sup> But this mode of stating the commencement of the risk must commonly be applied only to insurances on ships outward bound; for when insurance indeed is made on the homeward risk, the beginning of the adventure is sometimes stated to be *immediately from and after her arrival at the port abroad*; at other times, *from the departure*; and, in short, it is so variable, that nothing certain can be said upon the point, depending, as it always has, and always must, upon the inclinations of the insured, as expressed in the contract.

6. *Of the various perils and risks against which the underwriter insures.* These must always be inserted in all policies, and indeed the words now used are so comprehensive, that in the opinion of Molloy, all those curious questions, which occasioned much debate and controversy among the lawyers of former days, are now finally settled.<sup>f</sup> Be this as it may, it is certain that there is hardly any event which the imagination can form, as likely, in the common course of things, to happen to any ship, that is not amply provided for by the policies now used by underwriters. They undertake to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people, of what nation, condition or quality soever; barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, or any part

<sup>a</sup> *Hurry v. R. E. Assurance*, 2 B. & B. 430; see also *Matthie v. Potts*, 3 B. & B. 23; and *Morewood v. Pollok*, 1 E. & B. 743.

<sup>b</sup> *Sparrow v. Carruthers*, 2 Str. 1236.

<sup>c</sup> *Strong v. Nattally*, 1 N. R. 16.

<sup>d</sup> See *Noble v. Kennaway*, Dougl. 492.

<sup>e</sup> 1 Magens, 47.

<sup>f</sup> B. 2, c. 7, s. 7.

thereof."<sup>a</sup> But although the words descriptive of the hazards run by the insurers be so very large and comprehensive, it should seem that a great difference is to be made between the damage sustained by goods on board a ship, and that which occurs *by external accidents*; that the insurer is liable in the latter case cannot admit of a doubt, but as the former may proceed from the bad stowage of the goods, or from their being exposed to wet, and as they are neglects attributable to the master, the ship and not the insurer ought to be answerable. Upon this point, however, I find no case in the reports; and therefore I start it rather as a doubt in my own mind, than as presuming to hint at an opinion. In Malyne<sup>b</sup> it is said, that if there be thieves on shipboard among themselves, the master of the ship is to answer for that, and to make it good, so that the insurers are not to be charged with any such loss, for he supposes the word *thieves* to mean assailing thieves only, for so he terms them. It is certain, that the 7 Geo. 2, c. 15, gives some countenance to this idea, by the preamble to which it appears, that previous to the period of passing that act, the owners of the ship were liable to the proprietors of the goods for any embezzlement, secreting, or making away with, of the goods, by the master or the mariners, or with their privity, to whatever amount the value might be: by that statute, however, the measure of the responsibility is to be the value of the ship and freight. See also the 26 Geo. 3, c. 86, which limits the shipowner's responsibility to the value of the ship and freight, in cases of robbery from without. See also 53 Geo. 3, c. 159; and hereinafter titles — *Causes which excuse the masters and owners; Limitation of responsibility, &c.* To be sure, it is not a necessary consequence, that because the owner is liable in such a case, therefore the insurer, if an insurance has been made, must be discharged. Roccus,<sup>c</sup> however, is of opinion, that when a theft is committed on board the ship, and some goods have been stolen, then the insurers are not bound, because the owner of the goods, as much as in him lies, is obliged to take care of them; and if they are stolen while in the vessel, this cannot be called an accident, but has happened through the negligence of those who did not take proper care of them. He adds, that the master or owners being liable is an additional reason for this regulation, because the master of the ship is held answerable for thefts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them safe and whole. It was thought proper thus to state the opinion of this learned writer upon the subject, on account of the total silence of the law of England in this respect.

But that the underwriter is liable for a robbery of the goods insured, when committed by *thieves from without*, cannot be doubted; as thieves are a peril expressly insured by the policy.<sup>d</sup>

In addition to the various risks above enumerated, which the underwriters take upon themselves, it is frequently the practice to

<sup>a</sup> 1 Magens, 50.

<sup>b</sup> C. 25. Lex Merc. Red. 4th edit.  
p. 295.

<sup>c</sup> Roccus de Assec. Not. 32.

<sup>d</sup> Harford v. Maynard, before Lord Mansfield at Guildhall, Hil. vac. 1785.

*Park on Insurance.* insure her, lost or not lost, which is certainly very hazardous;<sup>a</sup> because if the ship should be lost at the time of the insurance, still

the underwriter, provided there be no fraud, is liable. The premium is, however, great in proportion, depending upon the circumstances stated to show the probability or improbability of the ship's safety. These words, lost or not lost, are peculiar to English policies, not being inserted in the policies of foreign nations.<sup>b</sup>

7. *The consideration or premium for the risk or hazard run.* This is the most material part of the policy, because it is the consideration of the premium received, that makes the underwriter liable to the losses that may happen. In English policies it is always expressed to have been received at the time of underwriting; *we the assurers confessing ourselves paid the consideration due unto us for this assurance by the assured.*

As between the underwriters and the assured, this receipt is, in the absence of fraud,<sup>c</sup> conclusive; so that no action can be maintained for premiums by the underwriters against the assured.<sup>d</sup> As between the underwriter and the broker, it is no evidence at all.<sup>e</sup> The broker is the agent both of the assured and of the underwriter; of the assured, in effecting the policy; and of the underwriter, in receiving the premium from the assured. By the general course of dealing, the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit in account by the broker to the underwriter, and the underwriter, by the terms of the policy, having acknowledged the receipt of the premium, are equivalent to actual payment.<sup>f</sup> Thus it is that the broker can recover the premiums, as for money paid; and that, too, before he has actually paid them to the assurer.

8. *The day, month, and year, on which the policy is executed.*<sup>g</sup> This insertion seems very necessary, because by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear whether there is any reason to suspect fraud or improper conduct on the part of the insured.

The 9th and last requisite of a policy of insurance is, that it be duly stamped. The statutes, relating hereto, are the 35 Geo. 3, c. 63, and the 7 & 8 Vict. c. 21. By the former, all former duties were abolished; and, since then, the duties thereby imposed have been, from time to time, reduced, especially by the latter Act, which

<sup>a</sup> Molloy, b. 2, c. 7, s. 5.

<sup>b</sup> Roccus, Not. 51; 5 Burr. 2803.

<sup>c</sup> Foy v. Bell, 3 Taunt. 439; Mavor v. Simeon, Ib. 497.

<sup>d</sup> Dalzell v. Mair, 1 Camp. 532; Anderson v. Thornton, 8 Exch. 429.

<sup>e</sup> 1 Camp. *supra*.

<sup>f</sup> See Power v. Butcher, 10 B. & C.

335, referring to *Airy v. Bland*, Marsh on Ins. 300; *Grove v. Dubois*, 1 T. R. 112; *DeGaminde v. Pigou*, 4 Taunt. 247; *Minett v. Forrester*, Ib. 541. The questions of *set-off*, *mutual credit*, and the like, will be considered in their proper places.

<sup>g</sup> 1 Mag. 84.

now regulates the *amount of duty*. The 35 Geo. 3, c. 63 (whose provisions for the most part are still in force), first of all imposes other duties; it then requires the contract or agreement to be engrossed, printed, or written; and gives it the name of a *policy of Insurance*; that the premium or consideration, the particular risk, together with the names of the subscribers and underwriters, and sums insured, be respectively expressed in the policy; and, in default thereof, declares every such insurance null and void to all intents and purposes whatever. The 10th sect. provides for an allowance to be made, under certain circumstances, by the Commissioners, when the sums insured, on homeward voyages, shall be found to exceed the interest of the assured. The 13th sect. relates to the alteration of the policy as already noticed.<sup>a</sup> Sect. 14 makes the brokerage not a legal charge unless the policy be stamped; and prohibits stamping it after it has been underwritten.<sup>b</sup> By sect. 15 a penalty is imposed both on the persons procuring, and the brokers effecting, insurances on policies not duly stamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and by the 17th sect. every underwriter subscribing such illegal policy is also liable to a like penalty. But the 7 & 8 Vict. has reduced the amount of duties; and contains some general provisions of importance. After reciting (amongst other things) the 55 Geo. 3, c. 184, and the 3 & 4 Wm. 4, c. 23, which imposed other duties, it, in its turn, abolishes existing duties, and grants new ones in lieu thereof. It then gives a reduced penalty for evading the duties, and continues thus: "Provided always, that nothing herein contained shall extend to subject any member, officer, or servant of the *London Assurance* or *Royal Exchange Assurance Corporations* respectively to any of the penalties by this Act imposed, for or by reason of his making any agreement to insure, by any label, slip, or memorandum in writing, upon unstamped paper; provided that, in every such case, the day on which such agreement shall be made, shall be truly expressed in words at length on such label, slip, or memorandum, and a policy of insurance, according to such agreement, shall be made out in due form, on vellum, parchment, or paper, duly stamped, and which shall be duly executed within three office days from the time of making such agreement as aforesaid."<sup>c</sup> It then concludes with the

*Schedule.*

For and in respect of every policy, *for or upon any voyage whatever*, the following duties, where the whole sum insured shall not exceed one hundred pounds, and where the whole sum insured shall exceed one hundred pounds, then for every one hundred pounds and also for any fractional part of one hundred pounds whereof the same shall consist; that is to say:—

|                                                                                                                                                                                           | £ | s. | d.  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|----|-----|
| Where the premium or consideration for such insurance actually and <i>bond fide</i> paid, given, or contracted for, shall not exceed the rate of 10s. <i>per cent.</i> on the sum insured |   | 0  | 0 3 |

<sup>a</sup> P. 2.

<sup>b</sup> Roderick v. Hovil, 3 Camp. 103.

<sup>c</sup> Sect. 4. *The General Stamp Act*

(13 & 14 Vict. c. 97), except by the interpretation clause, does not affect marine insurances.



| <u>Paid on Insurance..</u>                                                                                                                            | £ | s. | d. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|---|----|----|
| And where the same shall exceed the rate of 10s. <i>per cent.</i> and shall not exceed the rate of 20s. <i>per cent.</i> on the sum insured . . . . . | 0 | 0  | 6  |
| And where the same shall exceed the rate of 20s. <i>per cent.</i> and shall not exceed the rate of 30s. <i>per cent.</i> on the sum insured . . . . . | 0 | 1  | 0  |
| And where the same shall exceed the rate of 30s. <i>per cent.</i> and shall not exceed the rate of 40s. <i>per cent.</i> on the sum insured . . . . . | 0 | 2  | 0  |
| And where the same shall exceed the rate of 40s. <i>per cent.</i> and shall not exceed the rate of 50s. <i>per cent.</i> on the sum insured . . . . . | 0 | 3  | 0  |
| And where the same shall exceed the rate of 50s. <i>per cent.</i> on the sum insured . . . . .                                                        | 0 | 4  | 0  |

But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said respective duties, as the case may require, shall be charged thereon in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* which shall be thereby insured upon any separate and distinct interest.<sup>a</sup> And for and in respect of every policy of assurance *for any certain term or period of time*, the following rates or sums for every 100*l.*, and also for any fractional part of 100*l.* whereof the same shall consist; that is to say:—

|                                                                                                                            | £ | s. | d. |
|----------------------------------------------------------------------------------------------------------------------------|---|----|----|
| Where any such insurance shall be made for any term or period not exceeding six calendar months . . . . .                  | 0 | 2  | 6  |
| Exceeding six calendar months . . . . .                                                                                    | 0 | 4  | 0  |
| And for and in respect of every <i>mutual insurance</i> upon any <i>voyage whatever</i> , and not for any period of time:— |   |    |    |

|                                                                                                                                                  | £ | s. | d. |
|--------------------------------------------------------------------------------------------------------------------------------------------------|---|----|----|
| For every sum of 100 <i>l.</i> , and also for each and every fractional part of 100 <i>l.</i> thereby insured to any person or persons . . . . . | 0 | 2  | 6  |

<sup>a</sup> See *Rapp. v. Allnutt*, 15 East, 601.

## CHAPTER II.

## CHAP. II.

## CONSTRUCTION OF THE POLICY.

THE same rule of construction which applies to other instruments applies to this, *that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense*, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of insurance and other instruments, in this respect, is, that the greater part of the printed language of them being invariable and uniform, has acquired, from use and practice, a known and definite meaning; *and that the words superadded in writing* (subject, indeed, always to be governed, in point of construction, by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, *to have a greater effect attributed to them than to the printed words*, inasmuch as the written words are the immediate language and terms selected by the parties themselves, for the expression of their meaning, and the printed words are a general formula, adapted equally to their case and that of all other contracting parties, upon similar occasions and subjects.<sup>a</sup> But, in the construction of policies, no rule has been more frequently followed than the *usage of trade*, with respect to the particular voyages or risks to which the policy relates. General rule of construction.

*The great and leading cases upon questions of construction are Tierney v. Etherington,<sup>b</sup> Pelly v. The R. Exch. Ass. Comp.,<sup>c</sup> and Robertson v. French.<sup>d</sup>* In these cases, the principles which are to be observed in the construction of policies are so fully considered, and the application of them to the particular circumstances of the different cases is made with so much accuracy and perspicuity, that they are to be regarded as the pole star to direct our inquiries upon all similar occasions. The first of these causes was an action upon a policy of insurance "on goods, in a Dutch ship from Malaga to Gibraltar, and at and from thence to England and Holland, both or either: on goods as hereunder agreed, beginning the adventure from the loading, and to continue till the ship and goods be arrived at England or Holland, and there safely landed." The agreement was, "that upon the arrival of the ship at G., the goods might be unloaded and reshipped in one or more British ship or ships for England and Holland, and to Usage of trade.

<sup>a</sup> Robertson v. French, 4 East, 136; Hunter v. Leathley, 10 B. & C. 871.

<sup>c</sup> Ib.

<sup>d</sup> 4 East, 136.

<sup>b</sup> 1 Burr. 348.

Leading cases of construction.

*Park on Insurance.* return 1 per cent. if discharged in England." It appeared in evidence that when the ship came to G., the goods were unloaded, and put into a store-ship (which, it was proved, was always considered as a warehouse), and that there was then no British ship there. Two days after the goods were put into the store-ship they were lost in a storm. The question was, whether this was a loss within the construction of the policy. Lee, Ch. Just., said, "It is certain that in the construction of policies, the *strictum jus*, or *apex juris*, is not to be laid hold of; but they are to be construed largely for the benefit of trade, and for the insured. Now it seems to be a strict construction, to confine this insurance only to the unloading and reshipping, and the accidents attending that act. *The construction should be according to the course of trade in this place*; and this appears to be the usual method of unloading and reshipping in that place, viz. that when there is no British ship there, then the goods are kept in store-ships. Where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So, if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy, if that be the usual place to which the ships come. Therefore, as here is a liberty given of unloading and reshipping, it must be taken to be an insuring under such methods as are proper for unloading and reshipping. There is no neglect on the part of the insured, for the goods were brought into port the 19th, and were lost the 22nd of Nov. This manner of unloading and reshipping is to be considered as the necessary means of attaining that which was intended by the policy, and seems to be the same as if it had happened in the act of unshipping from one ship into another. And as this is the known course of the trade, it seems extraordinary if it was not intended. This is not to be considered as a suspension of the policy; for, as the policy would extend to a loss happening in the unloading and reshipping from one ship to another, so any means to attain that end come within the meaning of the policy." The plaintiff had a verdict. Afterwards a new trial was moved for; but it was refused by Lee, Ch. Just., Mr. Just. Chapple, and Mr. Just. Denison, against the opinion of Mr. Just. Wright.<sup>a</sup> The next of these causes came before the court upon a case reserved for their opinion, after a trial and verdict for the plaintiff, at Guildhall, before Ld. Mansfield. It was an action of covenant upon a policy of insurance. The case states that the plaintiff, being part owner of the ship O., an E. I. ship then lying in the Thames, and bound on a voyage to China, and back again to London, insured it "at and from London to any ports or places beyond the Cape of Good Hope, and back to London, free from average under 10 per cent. upon the body, tackel, apparel, ordnance, ammunition, artillery, boat, and other furniture of and in the said ship; beginning the adventure upon the said ship from and immediately following the date of the policy, and so to continue and endure until the ship shall be arrived as above, and there anchored 24 hours in good safety." The perils mentioned in the policy

<sup>a</sup> Easter Term, 1743.

were the common perils, viz., "of the seas, men of war, fire, &c." CHAP. II.  
 The ship arrived in the river Canton, in China, where she was to stay to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture, were, by the captain's order, taken out of her, and put into a warehouse, or storehouse, called a bank-saul, built for that purpose on a sand-bank, or small island, lying in the said river, near one of the banks called Bank-Saul Island; in order to be there repaired, kept dry, and preserved, till the ship should be heeled, cleaned, and refitted. Some time after this a fire broke out in the bank-saul belonging to a Swedish ship, and communicated itself to another bank-saul, and from thence to that belonging to the O., and consumed the same, together with all the sails, yards, &c., belonging to the O. that were therein. The case states further, that it was the universal and well-known usage, and has been so for a great number of years, for all European ships which go a China voyage, except Dutch ships (who, for some years past, have been denied this privilege by the Chinese, and who look upon such denial as a great loss), when they arrive near this Bank-Saul Island in the river Canton, to unrig the ships, and to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture, and to put them on shore in a bank-saul, built for that purpose on the said island (in the manner that had been done by the captain of the O. on the present occasion), in order to be repaired, kept dry, and preserved until the ships should be heeled, cleaned, and refitted. The case adds, that so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived from her said voyage in the Thames, having been again rigged, and put in the best condition the nature of the place and circumstances of affairs would permit. The question for the opinion of the court was, whether the insurers were liable to answer for this loss, so happening upon the bank-saul, within the intent and meaning of this policy. The court, after a solemn argument, took time to consider the question, and then Ld. Mansfield delivered the unanimous opinion of the court for the plaintiff. "By the express words of the policy," says he, "the defendants have insured the tackle, apparel, and other furniture of the O. from fire, during the whole time of her voyage, until her return in safety to London, without any restriction. Her tackle, apparel, and furniture, were inevitably burnt in China, during the voyage, before her return to London. The event, then, which has happened is a loss within the general words of the policy; and it is incumbent upon the defendant to show, from the manner in which this misfortune happened, or from other circumstances, that it ought to be construed a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or master of the ship, the insurer ceases to be liable; because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end. But the master is not in fault, if what he did was done in the usual course, and for just reasons. The insurer, in estimating

*Park on Insurance.*

the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen, and in contemplation at the time he engaged; he took the risk, upon a supposition, that what was usual or necessary should be done. *In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed.* The usage, when foreseen, is rather allowed to be done than what is left to the master's discretion upon unforeseen events; yet, if the master, *ex justā causā*, go out of the way, the insurance continues. Upon these principles, it is difficult to frame a question which can arise out of this case, as stated. The only objection is, that they were burnt in a bank-saul, and not in the ship; upon land, not at sea, or upon water; and being appertinent to the ship, losses and dangers ashore could not be included. The answer is obvious: 1st, the words make no such distinction; 2nd, the intent makes no such distinction. Many accidents might happen at land, even to the ship. Suppose a hurricane to drive it a mile on shore; or an earthquake may have a like effect; suppose the ship to be burnt in a dry dock, or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom, or other mischance; these are all possible cases. But what might arise from an accidental repair of the ship, is not near so strong as a certain necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned, and refitted in the river Canton; they knew that the tackle would then be put in the bank-saul; they knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, *ex justā causā*: but describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No, 'tis *ex justā causā*, which always excuses. Had the insurers in this case been asked, whether the tackle should be put in the bank-saul, they must, for their own sakes, have insisted that it should. They would have had reason to complain, if from their not being put there a misfortune had happened. In such a case the master would have been to blame, and by his fault would have varied the chance. They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this case, in reason and justice, and within the words, intent, and meaning of this policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss." The general rule of construction, so accurately expressed by Ld. Ellenborough in *Robertson v. French*, stands at the head of this chapter.

So, the clause, *warranted to depart with convoy*, must be construed according to the usage among merchants; that is to say, from the place where convoys are usually to be had.<sup>a</sup> So, a particular voyage is not necessarily the most direct, but such as the usage of the trade points out.<sup>b</sup> So, if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, it is a compliance with the policy, if that be the *usual* place to which ships come.<sup>c</sup> If the usage be general, though not uniform, the underwriters are bound to take notice of it.<sup>d</sup>

A policy shall be construed to run until the ship shall have ended How long and be discharged of her voyage; for arrival at the port to which to run. she was bound, is not a discharge till she is unloaded; and it was so judged by the whole court upon demurrer.<sup>e</sup> But, although this construction may be perfectly right, where the policy is *general* from A. to B., yet, if it contain the words usually inserted, *and till the ship shall have moored at anchor 24 hours in good safety*, the underwriter is not liable for any loss arising from seizure *after* she has been 24 hours in port, though such seizure was in consequence of an act of barratry of the master during the voyage; for, if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.<sup>f</sup> In the case cited for this, the proximate cause of the loss was, not the barratry of the master, but the seizure after the policy had expired; and therefore the underwriters were not liable for the loss. But when the proximate cause of loss, as an injury by stranding, takes place during the time covered by the policy, though the loss be not ascertained till after, the underwriters are liable.<sup>g</sup> Under policies so worded, it is often difficult to say when the ship is moored in safety. To determine it we must always ask, was she, at the time of the injury, at the place of her destination, or at the port where her cargo was intended to be discharged.<sup>h</sup>

In an action upon a policy of insurance, before Ld. Ch. Just. Hardwicke, it has been held that the words *at and from B. to E.*, meant the first arrival at B.; and it was agreed, that when such words are used in policies, *first arrival* is always implied and understood.<sup>i</sup> It has likewise been held,<sup>k</sup> that when a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable; but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner. The case cited

<sup>a</sup> Lethulier's Ca., 2 Salk. 443; Gordon v. Morley, and Campbell v. Bordieu, Str. 1265.

<sup>b</sup> Bond v. Gonsales, 2 Salk. 445.

<sup>c</sup> Constable v. Noble, 2 Taunt. 403.

<sup>d</sup> Vallance v. Dewar, 1 Camp. 503.

<sup>e</sup> Anon. Skin. 243.

<sup>f</sup> Lockyer v. Offley, 1 T. R. 252.

<sup>g</sup> Knight v. Faith, 15 Q. B. 667; over-

ruling Meretony v. Dunlope, 1 T. R. 260.

<sup>h</sup> See Samuel v. The R. Exch. Ass. Co., 8 B. & C. 120; Whitwell v. Harrison, 2 Exch. 127; and the cases there cited of Keyser v. Scott, 4 Taunt. 660; Dalgleish v. Brooke, 15 East, 299, *as to port of discharge*.

<sup>i</sup> 1 Atk. 548.

<sup>k</sup> Chitty v. Selwin, 2 Atk. 359

*Park on Insurance.* was an action on a policy of insurance on a ship at and from Jamaica to London. The ship had also been insured from London

At and from a place.

to Jamaica generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to show when the homeward-bound risk commenced, it was necessary to show at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery. In the *Trin. Term* following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although *Ld. Mansfield* said the inclination of his opinion at the trial was the contrary way. *Mr. J. Wilmot* thought the construction put upon the policy by the jury was the right one.<sup>a</sup> In a similar case, *Ld. Mansfield* laid down the same doctrine to the jury; viz., that the outward risk upon the ship ended 24 hours after its arrival in the first port of the island to which it was destined; but that the outward policy upon goods continued till they were landed.<sup>b</sup>

Under a policy *at and from* an island, a ship is protected in going from port to port in the island.<sup>c</sup> But a policy *at and from* a place, for instance at and from *Lyme to London*, which not only designates a town, but a port also, comprehending a large district of coast, so that *Bridport*, which is 8 miles nearer to London than the town of *Lyme*, does not protect a cargo laden anywhere within the limits of the port, such as *Bridport*, but must be taken to refer to the town itself.<sup>d</sup> A policy at and from *Martinique* and all and every *W. I. Islands* was held to warrant a course from *Martinique* to islands not on the homeward voyage.<sup>e</sup> Note.—When several termini are mentioned in a policy of insurance as the objects of the assured, those ports must be gone to in the order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation.<sup>f</sup>

Where the words of the policy were general, at and from a place, and the adventure on the goods to begin *from the loading thereof on board the ship* (without saying where), as in *Spitta v. Woodman*,<sup>g</sup> and *Langhorne v. Hardy*<sup>h</sup> (both in the court of C. B.), and in *Mellish v. Allnutt*,<sup>i</sup> goods loaded on board before the ship's arrival at the place named, as that from which the risk is to commence, will not be protected. But whenever the court can collect from the circumstances of the case, or from the words used, that it was the intention

<sup>a</sup> *Camden v. Cowley*, 1 Bl. 417.

<sup>b</sup> *Barras v. The L. Ass.* Sit. after Hil. 1782, at Guildhall; *Leigh v. Mather*, 1 Esp. 412.

<sup>c</sup> *Cruikshank v. Janson*, 2 Taunt. 301.

<sup>d</sup> *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, *Ib.* n.

<sup>e</sup> *Bragg v. Anderson*, 4 Taunt. 228; see also *Metcalf v. Parry*, 4 Camp. 123;

*Lambert v. Liddard*, 5 Taunt. 430;

*Pratt v. Ashley*, 1 Exch. 257.

<sup>f</sup> *Beatson v. Haworth*, 6 T. R. 531;

*Marsden v. Reid*, 3 East, 572; and see

*Pratt v. Ashley*, 1 Exch. 257.

<sup>g</sup> 2 Taunt. 416.

<sup>h</sup> 4 *Ib.* 628.

<sup>i</sup> 2 M. & S. 106.

of the parties to cover such *antecedent* loading, they will give the policy that construction.<sup>a</sup> In *M'Swiney v. R. Exch. Ass. Co.*<sup>b</sup> the plaintiff effected a policy at and from Madras to London on profit on rice laden or to be laden, beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at M. A part of the rice was shipped and the rest ready for shipping, but before it was actually so, the ship was by a peril of the sea disabled from taking in the rest. Held, amongst other important points in the cause, that the policy attached only to such rice as was actually on board.

CHAP. II.

When there is a liberty given by a policy to touch and stay at all ports for *all purposes whatsoever*, the stay must be for some purpose connected with the furtherance of the adventure, and whether that purpose be within the scope of the policy is a question for the court. But whether the ship has stayed an *unreasonable* time is for the jury.<sup>c</sup> Such a liberty includes a liberty for the purpose of taking in part of the goods insured.<sup>d</sup>

In an *insurance upon* freight, if an accident happen to the ship before any goods are put on board, which prevents her from sailing, the insured upon the policy cannot recover the freight which he would have earned if she had sailed.<sup>e</sup> But if part of the cargo be on board when such an accident happens, the rest being ready to be shipped, the insured may recover to the whole amount.<sup>f</sup>

On an assurance against loss by *fire*, if fire be the *causa causans*, whether it be wilful or accidental, the underwriters are liable for the loss.<sup>g</sup> When the fire took place in a public lighter used by the ship-owners to take the cargo on board, it was held that the 26 Geo. 3, c. 86, s. 2, did not protect them, as the fire was not on board their ship.<sup>h</sup>

The words *goods, specie, and effects*, by the usage of trade, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges *respondentia interest*.<sup>i</sup> Provisions for the use of the crew are protected by a policy on *ship and furniture*,<sup>k</sup> but such articles as sailors' wages and provisions expended while a ship is detained to refit, can never be allowed as a charge against the insurer *on the ship*.<sup>l</sup> So when there was a collision, and it turned out that the ship insured had done more damage than she had received, and was obliged to pay the owners of the other ship to some amount, held not chargeable on the underwriters.<sup>m</sup> In an insurance

<sup>a</sup> *Nonnen v. Kettlewell*, 16 East, 176; *East*, 323; *Davidson v. Williams*, 1 M. & S. 313.

<sup>b</sup> *Bell v. Hodson*, 1b. 240.

<sup>c</sup> 14 Q. B. 634.

<sup>d</sup> *Langhorn v. Allnutt*, 4 Taunt. 511.

<sup>e</sup> *Violet v. Allnutt*, 3 Ib. 419.

<sup>f</sup> *Tonge v. Watts*, 2 Stra. 1251.

<sup>g</sup> *Montgomery v. Egginton*, 3 T. R. 362; *Thompson v. Taylor*, 6 T. R. 478; See also *Horncastle v. Suart*, 7 East, 400; *Cellar v. McVicar*, 1 N. R. 23; *Atty v. Lindo*, 1b. 236; *Forbes v. Cowie*, 1 Camp. 520; *Forbes v. Aspinall*, 13

*East*, 323; *Davidson v. Williams*, 1 M. & S. 313.

<sup>h</sup> *Gordon v. Rimmington*, 1 Camp. 123.

<sup>i</sup> *Morewood v. Pollok*, 1 E. & B. 472.

<sup>j</sup> *Gregory v. Christie*, 3 Dougl. 419.

<sup>k</sup> *Brough v. Whitmore*, 4 T. R. 206, distinguishing *Robertson v. Ewer*, 1 Ib. 127.

<sup>l</sup> *Fletcher v. Pole*, cited in *Robertson v. Ewer*.

<sup>m</sup> *De Vaux v. Salvador*, 4 Ad. & E. 430.



*Park on Insurance.* upon a *Greenland* ship, it became a question whether the *lines and tackle* employed in the fishery in those seas could be recovered under a policy made upon the *ship, tackle, and furniture*, &c. The case came before the court upon a motion for a new trial, and the judges were unanimously of opinion, that they were not protected by the policy, not being part of the *ship's* tackle or furniture.<sup>a</sup>

Time-policies.

In the construction of policies of insurance for *time*, which are very frequent, the same liberality, equity, and good sense, have always prevailed, as in all other insurances: and the courts have gone, as far as possible, to decide according to the intention of the parties.<sup>b</sup> But although the judges have been thus liberal in their constructions of this contract, and have gone as far as possible to effectuate the intention of the parties, yet they have never extended those equitable principles to such a length as to say, that when a man has insured one species of property, he shall recover damage, which he has suffered by the loss of a description of property different from that named in the policy. Thus a man, who has insured a cargo of goods cannot recover, under such a policy, the freight which he has paid for the carriage of that cargo; nor shall it be permitted to an owner of a ship, who insures the ship merely, to demand satisfaction for the loss of merchandise laden thereon, or to ask from the insurers extraordinary wages paid to the seamen, or the value of provisions consumed, by reason of the detention of the ship at any port longer than was expected. Such attempts have, indeed, been made, but they have always been resisted: for to admit of such demands would introduce an infinite variety of frauds, and would be repugnant to the most settled maxims of insurance law, and to the constant practice and usage of trade. In *Molloy* it is said, that if a merchant insure a ship generally, and the ship then happen to be laden, and if it afterwards miscarry, the insurer shall not answer for the goods, but only for the ship.<sup>c</sup> This position stands uncontradicted by any foreign writer, ancient or modern, and is supported by several decisions of the first authority in this country.<sup>d</sup>

Having said thus much of construction in general, by which it appears, that the material rules to be adhered to are the intention of the parties entering into the contract and the usage of trade, it will be proper to consider more particularly what shall be construed a loss within the meaning of the policy. This mode of treating the subject naturally leads us to consider losses by perils of the sea; losses by capture, and by detention of princes or people; and losses by the barratry of the masters or mariners; which are the great divisions of perils insured, and which will furnish materials for the three following chapters.

<sup>a</sup> *Hoskins v. Pickersgill*, 3 Dougl. 223.

<sup>b</sup> See *Dixon v. Sadler*, 5 M. & W. 415.

<sup>c</sup> *Molloy*, b. 2, c. 7, s. 8.

<sup>d</sup> *Roccus de Assecur.* Not. 16; *Robertson v. Ewer*, 1 T. R. 127: and see *Brough v. Whitmore*, 4 Ib. 206.

## CHAPTER III.

CHAP. III.LOSSES BY PERILS OF THE SEA.<sup>a</sup>

THE subject-matter of this chapter may be reduced to a very small compass; as so many questions have been agitated in the English courts of law upon this point. It may, in general, be said, that everything which happens to a ship in the course of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the sea. Thus, in an insurance against perils of the sea, every accident happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence which human prudence could not foresee, nor human strength resist, may be considered as a loss within the meaning of such a policy, and the insurer must answer for all damages sustained in consequence of such accident.<sup>b</sup>

What is ordinarily called the *wear and tear* of a ship does not fall under this head; there must be something *fortuitous*. For instance, if a ship in harbour, by force of a *swell*, strike the ground, and so get injured, it is a loss by a peril of the sea; but if nothing fortuitous or unexpected occur, and she take the ground as might be expected with fall of the tide, this is not a loss by a *peril of the sea*.<sup>c</sup>

Although the courts in this case, as in all others, will endeavour to give effect to this species of contract by a liberal and equitable construction, yet they will be cautious not to extend the principle so far as to say, that the acts of the parties shall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and see that the loss, which has proved to have happened, is really one of those risks against which the underwriter has insured. The maxim is *in jure causa proxima non remota spectatur*: but it is often no easy matter to decide, whether a particular case falls within it or not. Thus a vessel laden with hides and tobacco, in the course of her voyage shipped large quantities of sea-water. On the termination of the voyage, it was discovered that the sea-water had rendered the hides putrid, and that the putrefaction of the hides had imparted a bad flavour to the tobacco, and had thereby injured it. Held, that the damage thus occasioned to the tobacco was a loss by perils of the sea.<sup>d</sup> In another case a policy was effected on horses warranted free from mortality and jettison. In the course of the voyage, in consequence of the agitation of the ship in a storm, the horses broke down the partitions by which they were separated, and by their kicking, bruised and wounded each other so much that they all died. Held, upon special

<sup>a</sup> See part 2, where it is considered with reference to a *bill of lading*.

<sup>b</sup> 1 Shower, 323. Roccus, Not. 64.

<sup>c</sup> See *Magnus v. Buttemer*, 11 C. B. 878.

<sup>d</sup> *Montoya v. London Ass. Co.*, 6 Exch. 451.

*Park on Insurance.* verdict, that this was a loss by a peril of the sea.<sup>a</sup> Had they died from want of sufficient and suitable provision, occasioned by extraordinary delay in the voyage from bad weather, or by a mistake of the captain, the loss would not have been referred to a peril of the sea, but to natural death.<sup>b</sup> Where a ship, insured against the perils of the sea, was injured by the negligent loading of the cargo by the natives on the coast of Africa, and, in consequence, shortly afterwards became leaky, and, being pronounced unseaworthy, *was run ashore*, in order to prevent her from sinking, and to save the cargo; held, a loss by perils of the sea.<sup>c</sup> This judgment recognises the cases of *Walker v. Maitland*,<sup>d</sup> and *Bishop v. Pentland*,<sup>e</sup> wherein it was decided, that the underwriters are liable for a loss arising *immediately* from a peril insured against, but *remotely* from the negligence of the master and mariners. A loss occasioned by another vessel, running down the ship insured is a peril of the sea.<sup>f</sup> When a vessel was sunk at sea by another firing upon her, mistaking her for an enemy, the court doubted whether it was a loss by *perils of the sea*; but placed it under the general words of the policy.<sup>g</sup>

The case of *M<sup>c</sup>Swiney v. R. Exch. Ass. Co.*<sup>h</sup> is another instance: there the insurance was on the expected *profits* of some rice, the risk attaching from the loading; part was shipped, and the rest ready, when, by a peril of the sea, the ship was disabled from taking in the rest; held, under a policy for the most part in the ordinary form, that if the policy had attached to the profit of rice on shore it was not lost by a peril of the sea. We should be always careful not to confound losses *on* the sea, with losses *by* the sea, that is, by perils of the sea. Thus the ship's bottom was, during the adventure, destroyed by worms; and she was, in consequence, condemned as irreparable; held, not a loss by a peril of the sea. It was a loss *on*, but not a loss *by* any peril of the sea.<sup>i</sup> When it was proved that the ship sailed on the voyage with the goods on board, and never arrived at her port of destination, and that, a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved; held, that this was *prima facie* evidence of a loss by perils of the sea, and that the plaintiff was not bound to call any of the crew, or to show that he was unable to procure their attendance.<sup>k</sup> But how is the question of *peril of the sea* to be decided? by the judge or by the jury? The rule of law is this:—when a question arises on the construction of a written instrument, without reference to any extrinsic evidence to explain it, the construction of it is for the judge, and not for the jury; but if parol evidence be required to explain it, as in mercantile contracts in which peculiar terms are used, these facts are for the jury. By this rule, then, the particular manner in which a loss happens is a question of fact

<sup>a</sup> *Gabary v. Lloyd*, 3 B. & C. 793; *Lawrence v. Aberdeen*, 5 B. & A. 107.

<sup>b</sup> *Tatham v. Hodgson*, 6 T. R. 656; *Gregson v. Gilbert*, 3 Dougl. 232.

<sup>c</sup> *Redman v. Wilson*, and *Redman v. Hay*, 14 M. & W. 476.

<sup>d</sup> 5 B. & A. 171.

<sup>e</sup> 7 B. & C. 219.

<sup>f</sup> *Smith v. Scott*, 4 Taunt. 127.

<sup>g</sup> *Cullen v. Butler*, 5 M. & S. 461.

<sup>h</sup> 14 Q. B. 662.

<sup>i</sup> *Kohl v. Parr*, 1 Esp. 442.

<sup>k</sup> *Koster v. Reed*, 6 B. & C. 19.

exclusively for the jury, and upon their finding, the judge decides whether that manner be a peril of the sea or not.<sup>a</sup> CHAP. IV.

If a ship has been missing, and no intelligence received of her within a *reasonable* time after she sailed, it shall be presumed that she has foundered at sea.<sup>b</sup> I have not been able to find any regulation in the law of England, or the usage of merchants, fixing a limited time within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which insurance is made. Indeed, from the nature of the thing, what shall be a reasonable time, in such cases, must always depend upon a variety of obvious circumstances. I understand, however, a practice has prevailed among insurers, which seems reasonable enough, that a ship shall be deemed lost, if not heard of in *six months after her departure* (or after the time of the last intelligence from her), for any part of Europe; and in *twelve months*, if for a greater distance. The only objection to such a practice is, that the latter period does not seem sufficient in India voyages. However, that is a matter for the insurer's consideration;<sup>c</sup> and even if he should pay the money under a mistake, supposing the ship lost, when it really is not, he might, as we shall see hereafter, if the insured were unwilling to refund, recover it back, in an action for money had and received to his use.<sup>d</sup> In Spain and France, this matter, however, is not left to uncertainty; but the time within which such losses may be demanded is fixed and ascertained by express regulations.<sup>e</sup> By the ordinances of the former, if any ship insured on going to or coming from the Indies is not heard of in a year and a half after her departure from the port where she loaded, it is declared that she is, and shall be deemed, lost: by those of the latter, if, after the expiration of *one* year, counting from the day of the departure of the ship, or from the day to which the last news received has reference (for ordinary voyages), after two years (for voyages of long course), the assured declare that he has received no news of her, he may make his cession to the underwriters, and demand payment, without being obliged to produce any attestation of the loss.<sup>f</sup>

## CHAPTER IV.

### LOSS BY CAPTURE AND DETENTION OF PRINCES.

CAPTURE, as applied to the subject of marine insurances, may be What. said to be a taking of the ships or goods belonging to the subjects of one country, by those of another, when in a state of public war.

<sup>a</sup> See part 2, tit. *Causes which excuse the owners and master.*

<sup>b</sup> *Green v. Brown*, 2 Stra. 1199; *Newby v. Read*, sit. after Mich., 3 Geo. 3, cited Holt, 243.

<sup>c</sup> Salk. 22.

<sup>d</sup> *Houstman v. Thornton*, Holt, 243.

<sup>e</sup> 2 Magens, 33.

<sup>f</sup> Code de Commerce, l. 2, tit. 10, s. 3.

*Park on Insurance.* What shall be considered as a capture, so as to render an insurer liable under a policy insuring against captures, has now become a question of very little difficulty. The law upon this subject is perfectly settled in England, *between the insurer and the insured*; and it is this, that the ship is to be considered as *lost* by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy: and the insurer must pay the value. If, *after* a condemnation, the owner recover or retake her, the insurer can be in no other condition, than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the loss actually sustained, and can be liable to no more. So that if, *after* condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must pay the loss so *actually sustained*.<sup>a</sup> No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be entitled; and by the 29 Geo. 2, c. 34, s. 24, and 33 Geo. 3, c. 66, s. 42, if an English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture. These principles, which are agreeable to the ideas of foreign writers, were settled by Lord Mansfield, and the whole Court of K. B., in *Goss v. Withers*,<sup>a</sup> and have never since been disputed. It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made *bonâ fide*, to prevent the ship from being condemned as prize.<sup>b</sup> It is true, the only case I have been able to find to this point is a *nisi prius* note; but when we consider the high authority from which this doctrine is taken, and that the thing in itself is not at all repugnant to the general principles of the law of insurance, it certainly has a claim to our attention.<sup>c</sup> Every insurance on *alien* property by a *British* subject must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and assurer.<sup>d</sup> If a ship be driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture, and not by perils of the sea.<sup>e</sup> A ship was captured by a French privateer, carried into Venice, and there condemned, together with her cargo: this appeared to have happened through a barratrous agreement between the captain of the ship and the captain of the privateer. Held, that the declaration laying a loss by capture, was sustained by the evidence.<sup>f</sup> The owners of a

When lost.

Insurers liable for charges of compromise.

Alien property.

Capture, proximate cause, when.

<sup>a</sup> *Goss v. Withers*, 2 Burr. 683.

<sup>b</sup> *Rocci Selecta responsa*, Resp. 34; 2 Burr. 695.

<sup>c</sup> *Berens v. Rucker*, 1 Wm. Black. 313, cited in *Tyson v. Gurney*, 3 T. R. 477, but *qu.* since *Havelock v. Rock-*

*wood*, 8 Ib. 268.

<sup>d</sup> *Kellner v. Le Mesurier*, 4 East, 396; *Brandon v. Curling*, Ib. 410.

<sup>e</sup> *Green v. Elmslie, Peake*, 212.

<sup>f</sup> *Arcangelo v. Thompson*, 2 Camp. 620.

vessel, who, by performing the stipulations of a charter-party, CHAP. IV. provoke confiscation by the illegal and piratical act of a foreign state, may recover against the insurers; declaring their loss to be *by forcible seizure, and capture by persons unknown.*<sup>a</sup> When, after a capture and an illegal condemnation by a French consul at B., the owner repurchased the ship at B.; held, that he could not recover from the underwriter money so paid.<sup>b</sup> A capture must be proved before a judge can receive the sentence of condemnation of a foreign Court of Admiralty as evidence of the facts on which the condemnation proceeded.<sup>c</sup> A licence is *prima facie* evidence, that when a ship left her port of outfit, she sailed upon her voyage insured.<sup>c</sup> Goods protected by a valued policy, being captured, are condemned as lawful prize, *the captors paying the freight*; the assured may, nevertheless, recover as for a total loss.<sup>c</sup> *Lloyd's* books are evidence of a capture.<sup>d</sup> If the assured's claim depends upon the judgment of a Court of Admiralty, the judgment must be produced. Thus, where one declared upon a total loss by capture, and after proving a capture, showed a recapture, upon which proceedings were had in an Admiralty Court; held, that he could not recover, without the proceedings, though he only claimed the amount of the loss sustained by the salvage proceedings and sale.<sup>e</sup> A policy on goods at and from *Liverpool* to any port in the river *Plate*, was effected after notification in the *London Gazette* that such ports were blockaded. The ship after such notification sailed from *Liverpool*, and was taken by a *Brazilian* frigate in the river *Plate* and sent to *Rio Janeiro* for adjudication, but was rescued by the master and crew, who brought the ship and cargo back to *Liverpool*, where the master landed and warehoused the goods. The assured, after they had heard of the capture, and after the rescue, but before they heard of it, gave notice of abandonment to the underwriters. The jury found that the master did not intend to break the blockade. Held, 1, that the voyage insured was not illegal, as the vessel might sail for *Buenos Ayres* without contravening the law of nations, for the purpose of inquiring whether the blockade continued. 2, That the insured had no right to recover for a *total loss* by reason of their having offered to abandon; because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made.<sup>f</sup>

It formerly occasioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was necessary for goods to remain in the hands of the enemy, in order to *divest* the original proprietor of his *property* in case of a *recapture*. All these doubts are now entirely removed, and can never again be agitated in this country, *between an insurer and insured*; *Ld. Mansfield*, for himself and brethren, having declared, in giving judgment in *Goss v. Withers*,<sup>g</sup> that these questions could

<sup>a</sup> *Sewell v. R. Exch. Ass.*, 4 Taunt. 856.

<sup>b</sup> *Havelock v. Rockwood*, 8 T. R. 277.

<sup>c</sup> *Marshall v. Parker*, 2 Camp. 70.

<sup>d</sup> *Abel v. Potts*, 2 Esp. 243.

<sup>e</sup> *Thelluson v. Shedden*, 2 N. R. 228.

<sup>f</sup> *Naylor v. Taylor*, 9 B. & C. 718.

<sup>g</sup> 2 Burr. 695.

*Park on Insurance.* never have been started in policies upon real interest, because, as we have seen, they never could have varied the case. But wager policies gave rise to them; for it was necessary to set up a total loss, as between third persons, for the purpose of their wager, though, in fact, the ship was safe, and restored to the owner. His Lordship laid down the same doctrine in *Hamilton v. Mendez*;\* the consequence of which is, that as wager policies are now expressly prohibited by statute,<sup>b</sup> these questions can never arise upon a policy of insurance. The only two possible cases, in which they can be material, are: 1, Between the owner and a neutral person who has bought the capture from the enemy: and, 2, between the owner and recaptor: but whatever rule ought to be followed in favour of the owner, against a recaptor or vendee, it can no way affect the insurance, between the insurer and insured.

*Effect of condemnation.* By the marine law of England, as practised in the Court of Admiralty previous to the passing of any Act of Parliament which commanded restitution, or fixed the rate of salvage, it was held that the property was not changed so as to bar the owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. Agreeably to this principle, judgment was given in that court, decreeing restitution of a ship retaken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case also, upon the same principle, was decided against the vendee after a long possession, two sales, and several voyages. Thus stands the marine law of England, by which it appears that the *jus postliminii* continues till condemnation, which, by the 29 Geo. 2, c. 34, s. 24, is extended and now continues for ever. However, as has been already said, the change of property is not at all material as between the insurer and insured, upon policies of real interest, which are the only policies that can now by law be effected.<sup>c</sup>

*May prosecute voyage after.* Before the subject of capture and recapture be closed, I ought to add, that by the prize Acts (33 Geo. 3, c. 66, s. 44; and 43 Geo. 3, c. 160, s. 41) if a ship be *retaken* before she has been carried into an enemy's port, it shall be lawful for her, with consent of the recaptors, to prosecute her voyage; and it shall not be necessary for the recaptors to proceed to an adjudication till six months, or till her return to the port from which she sailed; and it shall be lawful for the master, owners, &c., with consent of the recaptors, to unload and dispose of the cargo before adjudication; and, in case the vessel shall not return directly to the port from whence she sailed, or the recaptors shall have had no opportunity of proceeding to adjudication within the six months, on account of the absence of the said vessel, the Court of Admiralty shall, at the instance of the recaptors, decree restitution to the former owners, paying salvage, upon such evidence as to the said court, under all the circumstances of the case, shall appear reasonable; the expense of such proceeding not to exceed the sum of £14.

*Detention.* Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the subject of insurances, I proceed now

\* 2 Burr. 1198.

<sup>b</sup> 19 Geo. 2, c. 37.

<sup>c</sup> 2 Burr. 694.

to treat of losses arising from another species of capture, namely, by CHAP. IV.  
detention; a part of our inquiry which will not demand a long or tedious discussion. The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured, "by the arrests, restraints, and detainments of all kings, princes, and people,\* of what nation, condition, or quality whatsoever." The only question then is, what shall be considered as such detention; and, indeed, the words used are so large and comprehensive, as hardly to admit of a doubt even upon that head. The learned Roccus is of opinion "ut si merces captæ a potestate, seu iudice justitiam administrante in illo loco, aut a populo, aut ab aliâ quâcunque personâ per vim, absque pretii solutione, tenentur assecutores solvere æstimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium assecutorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus." <sup>b</sup> In another place he says, "Regis et principis factum connumeratur inter casus fortuitos; ideo si rex et princeps retineant navem oneratam frumento ex causâ penuriæ, quapropter navis non potuerit frumenta asportare ad locum destinatum, tenentur assecutores." <sup>c</sup> Malynes lays down the law to be, that the insurers are liable for all losses by arrests, detainments, &c., happening both in time of war and peace, committed by the public authority of princes. <sup>d</sup> And Lord Mansfield has said, that the insured may abandon in case merely of an arrest or embargo by a prince, not an enemy; and consequently such an arrest is a loss within the meaning of the word detention. <sup>e</sup>

*An embargo* is an arrest laid on ships or merchandise by public Embargo.  
authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. <sup>f</sup> This term has, also, a more extensive signification, for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprise. <sup>g</sup> Embargoes laid on shipping in the ports of Great Britain, by royal proclamation in time of war, are strictly legal, and will be equally binding as an Act of Parliament, because such a proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But, in times of peace, the power of the King of Great Britain to lay such restraints is doubtful; and therefore, where such a proclamation issued in the year 1766, against the words of a statute then in force, although absolutely necessary for the prevention of a dearth in this country, it was thought prudent to procure an Act of the legislature to indemnify those who advised or who acted under that proclamation. <sup>h</sup>

\* That is, the governing power of the country, *Nesbitt v. Lushington*, 4 T. R. 783.

<sup>b</sup> Not. 54.

<sup>c</sup> Not. 65.

<sup>d</sup> Malynes, b. 110.

<sup>e</sup> 2 Burr. 696.

<sup>f</sup> *Lex Merc. red.* 4th edit. 260.

<sup>g</sup> *Grot. de Jure Belli*, l. 2, c. 2, s. 10;

1 *Black. Comm.* 270.

<sup>h</sup> 7 *Geo. 3*, c. 7.



*Park on Insurance.*

In case of detention by a foreign power, which in time of war may have seized a neutral ship at sea, and carried it into port to be searched for enemy's property, all the charges consequent thereon must be borne by the underwriter; and whatever costs may arise from an improper detention must always fall upon them.<sup>a</sup> This was held by Willes, Ashhurst, and Buller, Js., in the absence of Ld. Mansfield, in a case,<sup>b</sup> the circumstances of which are as follows: It was an insurance on the ship *Thetis*, a neutral ship; and upon the trial, a special case was reserved for the opinion of the court, stating that the plaintiffs were Tuscan subjects, resident at Leghorn, sole owners of the ship *T.*, which sailed from Leghorn, and was captured by a Spanish ship off the coast of Barbary, with neutral goods on board, consigned to London. She was condemned as prize in the Court of Vice-Admiralty in Spain, which sentence was reversed, but upon another appeal to a superior court, the latter sentence was also reversed, and the former confirmed. The grounds of condemnation were two: 1st, that the ship *T.* refused to be searched, and resisted with force, having fired at the Spanish ship; 2nd, that she had no charter-party on board. The captain of the *T.* answered these two grounds: 1st, that he resisted and fired, because the Spaniard hailed him under false colours; 2nd, that he had taken the goods on board by the piece, and had not freighted his ship to any individual; in which case a manifesto was sufficient without a charter-party. The sentence of the last Court of Appeal, although it condemns, admits the neutrality, for it states the vessel to be a Tuscan ship. The last ground, relative to the charter-party, was not insisted upon. Upon the other, the three learned judges above mentioned were of opinion, *that a neutral ship is not obliged to stop to be searched*;<sup>c</sup> that the captain had not been guilty of barratry; that the searcher stops a neutral ship at his peril; that this was to be considered as a case of improper detention, and, consequently, that the plaintiff upon this policy was entitled to recover.

Right to search a neutral ship.

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for non-payment of customs. This was so ruled by Lord Commr. Hutchins, in Chancery, in the year 1690; and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct.<sup>d</sup> If, indeed, any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry of the master, to which such conduct would most certainly amount.<sup>e</sup>

Detention in landing port.

It has been a question whether the insurers were liable to the pay-

<sup>a</sup> 1 Magens, 67.

<sup>b</sup> *Saloucci v. Johnson*, B. R. Hil. 25 Geo. 3.

<sup>c</sup> This *dictum* does not appear to be

well founded: see Ch. XVIII.

<sup>d</sup> 2 Vern. 176.

<sup>e</sup> Vide the next chapter.

ment of damage arising by the *detention or seizure of ships by the government of the country in whose ports the ship loads.* CHAP. IV.

The following general rules are now clearly deducible from the authorities:—1. That it is not lawful for a *British* subject to insure an *enemy* from the effects of a capture made by *his* own government; for, in all questions arising between the subjects of different states, each is a party to the public authoritative acts of its own government; and, on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject, in a British court of justice, as he would be, if such act had been done immediately and individually by such foreign subject himself.<sup>a</sup>

Insurance of enemy's property.

2. That a *British* subject cannot insure the owner of a foreign vessel from the effects of a *British* capture, nor of an *embargo in the nature of reprisals and partial hostility* laid by the *British* government on ships of the state of such foreigner;<sup>b</sup> and whether the policy be effected before or after commencement of hostilities is not material.

Insurance against *British* capture.

3. One *British* subject may insure another *British* subject against the effects of an embargo laid on by the *British* government.<sup>c</sup>

4. That a *common embargo*, that is, an embargo laid on for general purposes, does not put an end to any contract between the parties, but operates only as a temporary suspension of it.<sup>d</sup>

5. That a capture or embargo of *neutral* property may be insured against.<sup>e</sup>

And lastly, where a policy is effected on behalf of the consignor, and his conduct or that of his own government is such as to deprive him of a *locus standi* in a British court of justice, the consignee is not at liberty indirectly to apply it to *his* interest, and enforce payment, as if it had been made on *his* account.<sup>f</sup> But these general rules are subject to this qualification, viz., that the *crown*, by virtue of its prerogative of peace and war, may *license* an *alien enemy* to trade to an enemy's country. And, as regards the contract of insurance, such a person is to be regarded as an adopted subject of the crown of Great Britain, and his trading as *British* trading: for the crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end.<sup>g</sup>

Effect of licence.

By what has been said, it appears, that before the insured can recover against the underwriter in cases of detention, he must first abandon to the insurers his right, and whatever claims he may have to the goods insured. This point will be fully treated of in the chapter of abandonment. It will be sufficient here to remark, that in most of the countries on the continent, the time for abandonment

Abandonment.

<sup>a</sup> *Touteng v. Hubbard*, 3 B. & P. 291; *Conway v. Gray*, 10 East, 546; *Gamba v. Le Mesurier*, 4 East, 408.

<sup>b</sup> *Ibid.*; and *Kellner v. Le Mesurier*, 4 East, 400; *Furtado v. Rodgers*, 3 B. & P. 200.

<sup>c</sup> *Page v. Thompson*, *sitt. after Hil.* T. 1804. *Guildhall*, cor. Lord Ellenborough.

<sup>d</sup> *Touteng v. Hubbard*, *supra*; *Hadley v. Clarke*, 8 T. R. 259.

<sup>e</sup> *Visger v. Prescott*, 5 Esp. 184; *Rotch v. Edie*, 6 T. R. 413.

<sup>f</sup> *Conway v. Gray*, *supra*. Although to insure against *British* capture, &c., is illegal, the policy (it is said) is not on that account wholly and to all intents void; see *Glaser v. Cowie*, 1 M. & S. 54, and *Lubbock v. Potts*, 7 East, 449.

<sup>g</sup> *Usparicha v. Noble*, 13 East, 332; and see *Fenton v. Pearson*, 15 East, 419.

Park on Insurance. in such cases is fixed to a limited period after the event has happened. In Bilbao the cession must be made within six months, if the loss has happened in any part of Europe; and within a year, if in a more distant country.<sup>a</sup> A similar regulation as to time is established by the ordinances of Middleburgh in Zealand.<sup>b</sup> By the *Code de Commerce*, l. 2, tit. 10, s. 3, within six months from the receipt of the news of conducting the vessel into one of the ports or places in Europe or of Asia and Africa in the Mediterranean, within one year from the news of her being conducted to the W. I. colonies, the Azores, Canaries, Madeira, and other islands and coasts, W. of Africa and E. of America, and within two years of the news of her being conducted into any other port in the world. By the law of England, there is no positive rule on this subject, consequently an insured has a right to abandon immediately upon hearing of the detention. But it should seem, that in order to prevent the underwriters from being harassed, the insured ought to make his election, whether he will abandon or not *within a reasonable time*:<sup>c</sup> and what that shall be, must in general depend upon the circumstances of the case.

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## CHAPTER V.

### LOSSES BY THE BARRATRY OF THE MASTER OR MARINERS.

It does not seem to have been anywhere precisely ascertained, from what source the term barratry has been derived. Indeed, the derivations of barratry have rather tended to confound than to throw any light upon the subject: for its root has been so frequently altered, according to the caprice of the particular writer, that it is impossible to decide which is the true one. The English, however, most probably have taken it from the French *barrateur*, which is to be traced to the Italians; but where the latter found this word is a thing by no means clear. Whatever the derivation may be, the word seems to have been originally introduced into commercial affairs by the Italians, who were the first great traders of the modern world. In the Italian dictionary, the word *barratrare* means to cheat; and whatsoever is done by the master amounting to a cheat, a fraud, a cozening, or a trick, is barratry in him. Postlethwaite, in his Dictionary of Trade and Commerce, defines barratry thus: "Barratry is committed when the master of the ship, or the mariners, cheat the owners or insurers, whether it be by running away with the ship, sinking her, deserting her, or embezzling the cargo." In another place, the same author observes, "One species of barratry in a marine sense is, when the master of a ship defrauds the owners or insurers, by carrying a ship a course different from their orders."

<sup>a</sup> 2 Magens, 375, 416.

<sup>b</sup> 2 Magens, 23.

<sup>c</sup> *Speedily, and in the first instance, post, Ch. IX. part 1.*

By the law of *England* barratry is a breach of duty on the part of the master or mariners, in respect to the owners, with a criminal intent or *ex maleficio*: in other words, any *fraudulent* or *criminal* conduct, against the owners of ship or goods, by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners, is barratry, although it be not done with intent to injure them, or to benefit, at their expense, the master or mariners.<sup>a</sup>

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen in the act of barratry; that is, it is not material whether it take place during the fraudulent voyage or after the ship has returned to the regular course; for the moment the ship is carried from its right track, with a fraudulent or criminal intent, barratry is committed. But the loss, in consequence of the act of barratry, must happen during the voyage insured, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and be there moored at anchor 24 hours in good safety, the underwriters are not liable, if, after this, she should be seized for that act of smuggling.<sup>b</sup>

To constitute barratry, it must be *without the knowledge or consent of the owners*: hence a master, being owner, cannot be guilty of it, because nothing can be so clear as this, that no man can complain of an act done to which he himself is a party.<sup>c</sup> But it is material to consider in what sense the word owner is to be understood in this definition. It has been argued that if A. be the owner of a ship, and let it out to B. as freighter, who insures it for the voyage, and if the deviation be with the knowledge of A., though unknown to B., the insurer is discharged. But the court overruled that argument, and said that, in order to discharge the insurer from the loss by barratry, it must appear that the act done was by the consent or with the privity of the owner, *pro hac vice*, that is, the freighter, the person insured.<sup>d</sup> In a court of equity the mortgagor is deemed owner of the thing mortgaged within the meaning of this rule.<sup>e</sup> Proof of the master being owner lies on the underwriter.<sup>f</sup>

A loss by barratry is well alleged, though the proof be that it happened by the act of an enemy and by barratry jointly.<sup>g</sup>

Even if the parties insert in the policy the words *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word barratry should be struck out of the policy; and most clearly the stipulation in the policy, respecting the employment of the ship in a lawful trade, must mean, as was said by Lord Kenyon in delivering the unanimous opinion of the Court, *the trade on which she is sent by the owners*.<sup>h</sup>

<sup>a</sup> Earle v. Rowcroft, 8 East, 125;

Vallejo v. Wheeler, Cowp. 154; Nutt v. Bourdieu, 1 T. R. 328.

<sup>b</sup> Lockyer v. Offley, 1 T. R. 252.

<sup>c</sup> Nutt v. Bourdieu, 1 T. R. 323;

Lewin v. Suasso, Ch. 16, Geo. 2. Postleth. Dict. vol. i. p. 147.

<sup>d</sup> Cowp. 144.

<sup>e</sup> Lewin v. Suasso, *supra*.

<sup>f</sup> Ross v. Hunter, 4 T. R. 33.

<sup>g</sup> Toulmin v. Anderson, 1 Taunt. 227;

Arcangelo v. Thompson, 2 Camp. 620.

<sup>h</sup> Havelock v. Hancil, 3 T. R. 277.

*Park on Insurance.*

Hitherto, we have considered barratry only as it affects the rights of the insurer and insured, which is certainly the material point of view in our present inquiry: but, before we come to the conclusion of this chapter, it will be proper to take notice of those positive regulations which exist in this and other countries, for the punishment of those who are guilty of some of the more heinous acts of barratry. By the ordinances of Middleburg, Rotterdam, and Hamburgh, if any act of barratry be committed by the master, various degrees of punishment, sometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt.<sup>a</sup>

We do not find that any punishment was expressly provided by the law of England for offences of this nature till the reign of Q. Anne, at which time, as may be collected from the preamble of the statute, the wilful casting away, burning, or destroying of ships by the master or mariners, was become very frequent. In her reign, and in that of her successors, the Legislature interfered;<sup>b</sup> but it is useless to refer more to them, as the law now stands upon the 7 & 8 Geo. 4, c. 30, and 7 Wm. 4, and 1 Vict. c. 89. The latter enacts, "That whosoever shall unlawfully and maliciously *set fire* to or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel *with intent thereby to prejudice any owner* or part owner of such ship or vessel, or of any goods on board the same, or any person that hath *underwritten* or shall underwrite any policy of insurance upon such ship or vessel or on the freight thereof, or upon any goods on board the same, shall be guilty of *felony*, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." And sect. 4 enacts, "That whosoever shall unlawfully or maliciously *set fire* to, cast away, or in any wise destroy any ship or vessel, either with *intent to murder* any person, or whereby the life of any person shall be endangered, shall be guilty of *felony*, and, being convicted thereof, shall suffer death." And the stat. 7 & 8 Geo. 4, c. 30, s. 10: "That if any person shall unlawfully and maliciously damage, *otherwise than by fire*, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the Court shall think fit, in addition to such imprisonment.

<sup>a</sup> 2 Magens, 77, 112, 215.

<sup>b</sup> 1 Ann, st. 2, c. 9, s. 4; 4 Geo. 1, c. 12, s. 3; 11 Geo. 2, c. 29, s. 6. And

felonies, &c., within the jurisdiction of the Admiralty may be tried at the assizes by the 7 & 8 Vict. c. 2.

## CHAPTER VI.

## CHAP. VI.

## PARTIAL LOSSES AND ADJUSTMENT.

HAVING, in the preceding chapters, treated fully of the different kinds of losses for which the underwriters are answerable, the subject naturally leads one to consider when losses shall be said to be total, and when partial or average, as they have been most commonly denominated. When we speak of a *total loss*, we do not always mean *Total loss.* to signify that the property insured is irrecoverably lost or gone, but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and so much injured as to justify him in abandoning to the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened. But the idea of a total loss, in this sense of the word, is so intimately blended and interwoven with the doctrine of *abandonment*, that it will add much to clearness and precision to refer what may be said on this subject till we come to the chapter on abandonment. In this place it will be sufficient to remark, that in case of a total loss, properly so called, the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter; at least, as far as his proportion of the insurance extends. This is evident from the nature of the contract; for the insurer engages, as far as to the amount of the prime cost or value, in the policy, that the thing insured shall come safe: he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the sale of the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset; he has no concern in any subsequent value. So likewise, if part of the cargo, *capable of a several and distinct valuation* at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. Thus much at present for *total losses*.

The subject of this and the following chapter is intricate and perplexing; and one source of perplexity upon this subject is, the irregularity and confusion which we meet with in the present form of policies of insurance. Ambiguities frequently arise in them, by using the same words in different senses; and in no instance is this *Average,* absurdity more glaring than in the use of the word *average*. This *what is.* word in policies has two significations; for it means *a contribution to a general loss*, and it also is used to signify *a particular partial loss*. In commercial affairs, indeed, it has no less than four different meanings, and therefore it cannot be wondered at if much confusion of ideas has arisen upon the subject. In order to prevent that, if possible, in the subsequent part of this work, I shall here endeavour to distinguish between the four different senses of the word "average;"

*Part on Insurance.*

General average.

Small or petty average.

and wherever I shall have occasion in future to speak of a damage arising to goods or other property not total, except when I am reciting the words of a policy, I shall take the liberty of calling it, as I have already done at the head of this chapter, a partial, not an average loss. When goods or merchandises carried by sea are thrown overboard in a storm, for the purpose of lightening the ship, the owners of the ship and of the goods saved contribute for the relief of those whose goods are ejected, in such a manner that all who profited by the lightening of the ship may bear a proportional loss of the goods thus thrown overboard for the common safety.<sup>a</sup> This contribution is what is called general or gross average, the full discussion of which will be the business of the next chapter. Small or petty averages are the next species; and, as these never fall upon the underwriters, I shall here set down all that is necessary upon that subject.<sup>b</sup> Petty average consists in such charges and disbursements, as, according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading or on the voyage. These charges are lodemanage, which, as it appears by Cowel's Interpreter, means the hire of a pilot for conducting a vessel from one place to another;<sup>c</sup> towage, pilotage, light-money, beaconage, anchorage, bridge toll, quarantine, river charges, signals, instructions, passage money by castles, expenses for digging a ship out of the ice, when frozen up, that it may be brought into a proper harbour; and at London, by custom, the fee paid at Dover pier. These seem to be all the articles which come under the denomination of petty or accustomed average, as well in this as in foreign countries.<sup>d</sup> For these charges the insurers are never answerable; but one-third of the expenses is borne by the ship, and two-thirds upon the cargo.<sup>e</sup> But, in order to discharge the insurer, it must appear that the disbursements were usual and customary in the voyage; for, if they were incurred for any extraordinary purpose, or in order to relieve the ship and cargo from some impending danger, they shall then be reputed a general average, and, consequently, be a charge on the insurer.<sup>f</sup> In lieu of these petty averages, it has become usual at some places to pay 5 per cent., calculated on the freight, and 5 per cent. more for primage to the captain.<sup>g</sup> Another species of average in matters of commerce is that which we are accustomed to meet with in bills of lading, *paying so much freight for the said goods, with primage and average accustomed.* In this sense, it signifies a small duty, which merchants who send goods in the ships of other men pay to the master over and above the freight, for his care and attention to the goods so entrusted to him.<sup>h</sup> This kind of average may also be laid out of the present inquiry, as it is too insignificant a charge to fall upon the underwriter.

Having thus disposed of the different kinds of average, so as to prevent a confusion of ideas, we shall now proceed to the main sub-

<sup>a</sup> Lex Merc. red. 147.

<sup>b</sup> Magens, 72.

<sup>c</sup> Cowel.

<sup>d</sup> 2 Mag. 180, 278.

<sup>e</sup> 1 Mag. 72.

<sup>f</sup> See *Da Costav. Newnham*, 2 T. R. 407.

<sup>g</sup> 1 Mag. 72.

<sup>h</sup> Jacob's Law Dict. title Average.

ject proposed, namely, what shall be considered as a partial loss. CHAP. VI.  
*Ex vi termini*, it implies a damage which the ship may have sus- Partial loss.  
 tained in the course of her voyage from any of the perils mentioned  
 in the policy: when applied to the cargo, it also means the damage  
 which goods may have received, without any fault of the master, by  
 storm, capture, stranding, or shipwreck, although the whole, or the  
 greater part thereof, may arrive in port. These partial losses fall  
 upon the owners of the property so damaged, who must be indemnified  
 by the underwriter. For if the goods arrive, but lessened in  
 value through damage received at sea, the nature of an indemnity  
 speaks demonstrably, that it can only be effected by putting the merchant  
 in the same condition in which he would have been if the  
 goods had arrived free from damage.<sup>a</sup>

The underwriters of London expressly declare, as appears from a Memorandum at the foot of the policy, that they will not answer for Memorandum clause.  
 partial losses not amounting to 3 per cent. This clause was introduced  
 into English policies about the year 1749, having long before  
 that time been generally used in almost all the trading countries in  
 Europe; and it was intended to prevent the underwriters from being  
 continually harassed by trifling demands.<sup>b</sup> But at the same time,  
 that they provide against trifling claims for partial losses, they undertake  
 to indemnify against losses, however inconsiderable, that arise  
 from a general average, because that can never happen but in cases  
 of imminent danger, when it is for the common interest that such  
 expenses should be incurred.

But in what cases, and in what manner, does the damage arising How 3 per cent. calculated.  
 from a partial loss exceed 3 per cent.? To answer this question, we  
 must ask—Is the insurance upon each separate article or on the  
 bulk? If it be upon each separate article, and that individual article  
 be totally lost or destroyed, the assured may recover the particular  
 sum insured on such article as for a *total loss*, and no question of the  
 kind arises. But if a part of a separate article, say of a chest of tea, or  
 if one of several chests of tea, when the insurance is on the bulk, be  
 injured or lost, then the 3 per cent. means 3 per cent. of the one  
 chest, or 3 per cent. of the whole bulk, as the case may be.<sup>c</sup> In  
 the time of Lord Mansfield, and indeed long after his time, there  
 could not be, on a policy in this form, a total loss, where the goods  
 still *physically* existed; and the *American* courts seem to adopt that  
 rule still; but *Roux v. Salvador*,<sup>d</sup> to be presently noticed, has placed  
 the law of this country on a different footing.

As clearness and precision are necessary upon all subjects, and What underwriter has to pay, and mode of stating loss.  
 more especially upon this, it will be proper to observe that, when we  
 speak of the underwriter being liable to pay, whether for total or  
 partial losses, it must always be understood, that they are liable only  
 in *proportion* to the sums which they have underwritten. Thus, if a  
 man underwrite 100*l.* upon property valued at 500*l.*, and a total loss

<sup>a</sup> 2 Burr. 1172.

<sup>b</sup> See 5 M & W. 575, and *ante*, p. 9.

<sup>c</sup> *Davy v. Milford*, 15 East, 559;  
*Hedburg v. Pearson*, 7 Taunt. 154; *Hills*  
*v. The L. Ass. Co.* 5 M. & W. 576;

*Navone v. Haddon*, 9 C. B. 41; in the  
 judgment of *Hills v. The Lond. Ass. Co.*  
*Davy v. Milford* is mistaken for, proba-  
 bly, *I Magens*, 73.

<sup>d</sup> 3 Bing, N. C. 266.



*Part on In-  
surance.*

happen, he shall be answerable for 100*l.*, and no more, that being his proportion of the loss. If only a partial loss, amounting to 60*l.* or 70*l. per cent.* upon the whole value, he shall pay 60*l.* or 70*l.*, being his proportion of the loss. But the sum he has to pay may exceed the amount of his subscription, for it is not, like the penalty of a bond, the limit of the underwriter's liability; but the proportion of the loss he is liable for.<sup>a</sup>

When a total loss happens, the insured is entitled to recover against the underwriter, as soon as he has proved the value of the thing insured; but when the value is inserted in a policy, the insurer, by allowing such insertion, has admitted the value to be as stated; and nothing remains but to prove that the goods insured were actually on board the ship.<sup>a</sup> It is only in cases of total loss that any difference consists between a valued and an open policy: in the former case the value is ascertained, in the latter it must be proved. But where the loss is partial, the value in the policy can be no guide to ascertain the damage, which then necessarily becomes a subject of proof as much as in the case of an open policy.<sup>b</sup>

When a partial loss happens, the first inquiry which naturally arises is this, for what does the insurer undertake to indemnify the owner, in case of a partial loss? To answer this question, regard must be had to the nature of the contract between the underwriter and the merchant. What is the nature of the contract? That the goods shall come safe to the port of delivery, or, if they do not, that the insurer will indemnify the owner to the amount of the value of the goods stated in the policy. Wherever the property insured is lessened in value, by damage received at sea, justice is done by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying him such proportion of the prime cost or value in the policy as corresponds with the proportion of the diminution in value occasioned by the damage. The question then is, *how is the proportion of damage to be ascertained?* It certainly cannot be by any measure taken from the prime cost: but it may be done in this way:—Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix whether it be a 3rd, a 4th, or a 5th worse, then the damage is ascertained to a mathematical certainty. How is this to be found out? Not by any price at the *outset* port, but it must be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shows whether the damaged goods are a 3rd, a 4th, or a 5th worse than if they had come sound; consequently, whether the injury sustained be a 3rd, 4th, or 5th of the value of the thing. And as the insurer pays the whole prime cost if the thing be wholly lost, so, if it be only a 3rd, 4th, or 5th worse,

<sup>a</sup> See *Blackett v. R. E. A. Co.* 2 C. & J. 244; *Le Cheminant v. Pearson*, 4 Taunt. 367; *Stewart v. Steele*, 5 Sc. N. R. 949.

<sup>b</sup> See *Usher v. Noble*, 12 East, 639.

<sup>c</sup> *Burr*, 1170.

he pays a 3rd, 4th, or 5th, not of the value for which it sold, but of CHAP. VI. the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges<sup>a</sup> and the premium of insurance, shall be the foundation upon which the loss shall be computed.<sup>b</sup>

This, it is true, said *Ld. Mansfield*, in *Lewis v. Rucker*, is going by a *different measure* in the case of a *partial* from that which governs in the case of a *total* loss, and, as a consequence, by a different measure in the case of a partial loss of a thing entire, and of a thing capable of a several and distinct valuation; but it is clear that the distinction is founded on the nature of the thing. In a subsequent case he said that the case of *Lewis v. Rucker* should be the rule in all similar cases; that is, whenever there was a specific description of casks or goods. But in *Le Crass v. Hughes*,<sup>c</sup> the property, which consisted of various goods taken from an enemy, was valued at the sum insured, and part was lost by peril of the sea; consequently, the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the value of the goods, and take a proportion of that sum as the amount of the goods lost. Again, the calculation is to be made on the difference between the respective *gross* proceeds of the same goods when sound and when damaged, and not on the *net* proceeds.<sup>d</sup> When the policy is on ship *and* cargo, and it never attaches as to part (as if no part of the cargo be put on board), the assured is entitled to recover such a proportion of the sum underwritten as the property upon which the policy did attach bears to the whole.<sup>e</sup>

The reader will bear in mind what has already been mentioned, namely, that the value upon which the foregoing calculation rests is the prime cost of the commodity, wholly independent of the rise or fall of the market, the difference of exchange, the schemes or speculation of the merchant, or the like.<sup>f</sup>

In a work of great merit, in explaining the mode of stating an average loss, there is the following sentence: "When a ship on her voyage puts into an intermediate port in distress to refit, &c., and, on unloading the cargo, it is discovered that some of the goods are damaged, which, *to prevent further deterioration*, are surveyed and sold on the spot; in such a case, the claim must be adjusted as a salvage loss, and all the charge must be borne by the insurers; for no particular average claim, according to the definition above-stated, can be made up when the goods are sold at any other place than the port of destination. Here the damaged goods are really (not as the term is often misapplied) sold on account of the underwriter, he paying all the charges, and even the freight; and the merchant is indemnified as for a total loss, *e.g.* he receives the net proceeds from the person who effects the sales, and the balance from the under-

<sup>a</sup> See *Winter v. Haldimand*, 2 B. & Ad. 649.

<sup>b</sup> *Lewis v. Rucker*, 2 Burr. 1167; *Usher v. Noble*, 12 East, 639.

<sup>c</sup> 3 Dougl. 81.

<sup>d</sup> *Johnson v. Sheddon*, 2 East, 581.

<sup>e</sup> *Amery v. Rogers*, 1 Esp. 208.

<sup>f</sup> *Ib.*, and *Thelluson v. Bewick*, 1 Esp. 77.

*Park on Insurance.* writer."<sup>a</sup> Whether, upon an open policy, a payment made in the shipment of goods can, in the event of a loss, be added to their price, so as to form part of the value, is not settled. The premium may, and it is difficult to draw a sound distinction.<sup>b</sup>

*Freight*, while the ship is in the course of earning it, is a benefit incident to the ship, and, therefore, becomes the property of the underwriters paying for a total loss.<sup>c</sup> When a ship has been repaired, the underwriters are entitled to a deduction of one-third, *new for old*; but they have no claim for it, unless the ship has been again put into the possession of the owner.<sup>d</sup>

*Prior partial loss.* The insurers on a ship, if they pay for a total loss, are not liable likewise in respect of any prior partial loss which has not been repaired; and if a total loss occurs, from which they are exempt, they are not liable for any prior partial loss, which, in that event, does not prove prejudicial to the assured.<sup>e</sup>

By the ordinances of Hamburg it is declared, that in case of a damage to goods, the assured is not to open the damaged goods but in the presence of the assurers or their deputies;<sup>f</sup> but if time and circumstances do not give opportunity to call them, yet the goods must not be opened, but in the presence of a notary and some witnesses. I can find no such regulation in the law of insurance in England, nor do I understand that any such is adopted in practice. Indeed, it seems to be needless; because an assured, in order to entitle himself to recover for a partial loss, must prove by disinterested witnesses, to the satisfaction of the jury, the quantity of goods damaged in the course of the voyage. The parties may, however, insist upon being present.

*Perishable goods, memorandum.* It will be proper here to remark that some goods are of a perishable nature; and therefore, when they are damaged by such natural and inherent principle of corruption in themselves, the underwriters, by the ordinances of most countries, are held to be discharged.<sup>g</sup> The underwriters of London have indeed, by express words inserted in their policy, declared, that they will not be answerable for any partial loss, happening to *corn, fish, salt, fruit, flour, and seed*, unless it arise by way of a general average, or in consequence of the ship being stranded.<sup>h</sup> This clause was introduced by the underwriters, to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of those commodities which we have just had occasion to enumerate. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the L. Ass.

<sup>a</sup> *Stevens on Average*, 5th edit. p. 80, see *Roux v. Salvador*, 3 Bing. N. C. 34.

<sup>b</sup> *Winter v. Haldimand*, 2 B. & Ad. 649.

<sup>c</sup> *Stewart v. Gen. Mar. Ins. Co.* 2 H. L. Ca. 159.

<sup>d</sup> *Da Costa v. Newnham*, 2 T. R. 407; *Pirie v. Steele*, 2 M. & Rob. 49.

<sup>e</sup> *Knight v. Faith*, 15 Q. B. 668.

<sup>f</sup> 2 Magens, 228.

<sup>g</sup> Code de Com. 342, Stockholm and Hamburg.

<sup>h</sup> See *Scott v. Bourdillion*, 2 N. R. 213. *Salt* does not include saltpetre, *Journe v. Bourdieu*, sittings after Easter Term, 27 Geo. 3.

Co., since which period the Cos. have left out the words, *or the ship be stranded*; and are now only liable in cases of a general average: but the old form is still retained by private insurers.<sup>a</sup>

It was for a long while the law of this country, and still seems to be that of the United States of *America*, that there cannot be a total loss of any of the articles named in the memorandum so long as they exist *in specie*; but this is not so now in this country. The change was finally established by the Court of Error in the well-known case of *Roux v. Salvador*.<sup>b</sup> Hides insured from *Valparaiso* to *Bordeaux*, free of particular average unless the ship were stranded, arrived at *Rio Janeiro*, on their way to B. in a state of incipient putridity occasioned by a leak in the ship; they were sold for one-fourth of their value at *Rio*, because, by the process of putrefaction, they would have been destroyed before they could have arrived at B. The ship was stranded after leaving *Rio*. Held, that the assured might recover, as for a total loss, without abandonment. "It has been contended," says Ld. Abinger, "that the fact of stranding being a condition to let in a claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they are landed. *We are not prepared to adopt that conclusion.*" It was also assumed in argument that there was a distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such loss. "But" (proceeds the judgment) "there is neither authority nor principle for the distinction in point of law. Whether a loss be total or partial in its nature must depend upon general principles. *The memorandum does not vary the rules upon which a loss be partial or total*; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principles on which a total loss is to be ascertained. Dismissing this distinction, then, the argument rests upon the position that if, at the termination of the risk, the goods remain *in specie*, however damaged, there is not a total loss. Now this position may be just, if by the *termination of the risk* is meant the arrival of the goods at their place of destination, according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure, before that period, by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may, in one sense, be said to have terminated at the moment when the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or partial, no doubt depends upon circumstances. But the existence of the goods or any part of them *in specie* is neither a conclusive, nor in many cases a material, circumstance to that

<sup>a</sup> Cantillon & the Lond. Ass. Co. cited in 3 Burr. 1553.

<sup>b</sup> 3 Bing, N. C. 266; see Lord Camp-

bell's masterly remarks on this case in *Knight v. Faith*, 15 Q. B. 649; and see *post*, Ch. IX. *Abandonment*.

Park on Insurance.

question. If the goods are of an imperishable nature, if the assured become possessed of, or can have the control over them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed; even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the *species* be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the *species* itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstance, over which he has no control, they can never, or within no assignable period, be brought to their original destination;—in any of these cases, the circumstance of their existing *in specie* at that forced determination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle.” The words in the memorandum *unless general or the ship be stranded*, are to be read as an *exception* and not as a *condition*. Therefore, when a ship is stranded in the course of her voyage, *although no part of the loss arise from the act of stranding*, the underwriters are liable for a partial loss arising from a peril insured against.<sup>a</sup>

Stranding, an exception, not a condition.

General average will be the subject of the following chapter.

Stranding, what is.

Let us now see what *stranding* means. It may be described generally thus:—when a vessel is, from an accidental cause, on the ground or strand, in such a situation as she ought not, in the usual course of things, to be in, while prosecuting the voyage on which she is bound, she is a ship stranded, within the meaning of the memorandum.<sup>b</sup> Ground or strand, of course, includes piles, rocks, and the like. Again, a mere touch and go is not a stranding; she must be more or less stationary.<sup>c</sup> Injury to the cargo, and want of injury to the ship, seem to be circumstances not properly ingredients in the question.

Adjustment.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to endorse on the policy, *adjusted this loss, at so much per cent.*, or some words to the same effect. This is called an *adjustment*. There

<sup>a</sup> Burnett v. Kensington, 7 T. R. 210; Nesbitt v. Lushington, 4 Ib. 783; Wells v. Hopwood, 3 B. & Ad. 35.

<sup>b</sup> Bishop v. Pentland, 7 B. & C. 219; Wells v. Hopwood, 3 B. & Ad. 35;

Corcoran v. Gurney, 1 E. & B. 461; Magnus v. Buttemer, 11 C. B. 877.

<sup>c</sup> McDougall v. R. E. Ass. Co. 4 Camp. 283.

may be an adjustment of a partial loss upon a *valued* policy, as well CHAP. VII. as upon an *open* one.<sup>a</sup> If an agent subscribes a policy, and has authority to do so, he has also authority to sign the adjustment.<sup>b</sup> Formerly, if the adjustment was signed by the underwriter, and after that he refused to pay, the owner had no occasion to go into proof of his loss, or of any of the circumstances respecting it. Fraud, of course, would vitiate it; but, until set aside on that ground, it was conclusive on the underwriter. It is now, however, regarded as *prima facie* evidence only, and will not conclude him as to any of the facts or circumstances upon which the adjustment was made.<sup>c</sup>

One rule relative to adjustments remains still to be mentioned, Money paid under a mistake. which is, that if an insurer pay money for a total loss, and in fact it be so at the time of adjustment, if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done, by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.<sup>d</sup> An adjustment and payment will not prevent the mistake from being set right, if there was a mistake in fact; for money paid under a mistake of facts may be recovered, unless the payer handed over the money intentionally, not choosing to investigate the facts. His having the *means* of knowledge is not a sufficient answer to such a demand.<sup>e</sup>

## CHAPTER VII.

### GENERAL OR GROSS AVERAGE.

AVERAGE, in that sense in which we are now to consider it, signifies What is. a *contribution* to a general loss:<sup>f</sup> but, in order to satisfy the reader, it will be necessary to give a more particular description of it. Whatever the master of a ship in distress does for the preservation of the whole; in other words, all loss which arises in consequence of extraordinary sacrifices made for the benefit of the whole concern, comes under the denomination of general average; as in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, and the like:<sup>g</sup> in which all who are concerned in *ship, freight, and cargo,*

<sup>a</sup> *Lewis v. Rucker*, 2 Burr. 1167.

<sup>b</sup> *Richardson v. Anderson*, 1 Camp.

<sup>c</sup> *Herbert v. Champion*, 1 Camp. 134; *Shepherd v. Chewter*, Ib. 274, n.; *Bilby v. Lumley*, 2 East, 469; *Regner v. Hall*, 4 Taunt. 725; and see *Kelly v. Solari*, 9 M. & W. 55.

<sup>d</sup> *Da Costa v. Firth*, 4 Burr. 1966.

<sup>e</sup> *Kelly v. Solari*, 9 M. & W. 55; *Bell v. Gardner*, 4 Sc. N. C. 621; *May v. Christie*, 1 Holt, 67.

<sup>f</sup> 3 Burr. 1555.

<sup>g</sup> See *Hallett v. Wigram*, 9 C. B. 580, and the remarks on the *Gratitudine*, 3 Rob. A. R. 260; *Plummer v. Wildman*, 3 M. & S. 482, and *Power v. Whitmore*, 4. Ib. 141.

*Park on Insurance.* are to bear an equal or proportionable part of the loss of what was so sacrificed for the common welfare; and it must be made good by the insurers, in such proportions as they have underwritten. In the works of writers upon commercial affairs, we very often meet with the word contribution, also signifying the thing just described; and in a marine sense, average and contribution are synonymous terms.<sup>a</sup>

This obligation, which, by the laws of all the maritime countries in Europe, binds the proprietor of the goods or ship saved to contribute to the relief of those whose goods are thrown overboard, is founded on the great principle of distributive justice: for it would be hard that one man should suffer by an act which the common safety rendered necessary, and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss. This obligation, which is tacitly entered into by all who have property at sea, was introduced by the Rhodians.<sup>b</sup> Their laws most equitably enacted, that all the property on board should contribute to this necessary and general loss; and in modern constitutions we find very little alteration in the doctrine of averages from that established at Rhodes. Similar regulations were made by the laws of Wisbuy, and, as I have already said, they are now become general.<sup>c</sup> From Molloy we learn that the Rhodian laws upon this subject were introduced into England by William the Conqueror. Beawes is of opinion that, in order to make the act of throwing things overboard legal,

What justifies jettison.

three things must concur:<sup>d</sup>—1st. That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation held between the master and men. 2ndly. That the ship be in distress, and that sacrificing a part be necessary, in order to preserve the rest. 3rdly. That the saving of the ship and cargo be actually owing to the means used, with that sole view. But of these, the second alone is strictly necessary by our law.<sup>e</sup> It appears, also, by the laws of Wisbuy, that, in an emergency of such a nature as to justify lightening the ship, it was necessary first to consult the owner of the goods or the supercargo; but, if they would not consent, the merchandise might, notwithstanding their refusal, be ejected, if it appeared necessary to the rest of the people on board; a regulation evidently founded in necessity, to prevent a sordid individual from obstructing a measure so essential to the general safety.<sup>f</sup> If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear, in which oath some of the crew must join, that the goods were cast overboard for no other cause, but for the safety of the ship and the rest of the cargo.<sup>g</sup> And, as the law has authorised such proceedings in these cases of imminent necessity, it will protect those who act *bond fide*, and will indemnify them against all consequences. Thus, in an action of trespass against a man for throwing goods overboard,<sup>h</sup>

<sup>a</sup> Beawes, 147; Mag. 55.

<sup>b</sup> Leg. Rhod. s. 2, art. 9.

<sup>c</sup> Laws of Wisbuy, art. 20, l. 2, 6.

<sup>d</sup> 3.

<sup>e</sup> Beawes, Lex Merc. 148.

<sup>f</sup> 1 East, R. 220.

<sup>g</sup> Laws of Wisbuy, art. 20; laws of Oleron, art. 8.

<sup>h</sup> Beawes, 148; Molloy, l. 2, c. 6, s. 2.

<sup>i</sup> Mouse's Case, 12 Co. 63.

he pleaded specially, that it was done in a storm, in a case of necessity, *navis levandæ causâ*; and, if that act had not been done, that the passengers must all have perished. The court held that the plea was good, and the defendant had judgment. It is not always necessary for the purpose of contribution that the ship should arrive at the port of destination. If the jettison, for instance, does not save the ship, but she perishes in the storm, there shall be no contribution of such goods as may happen to be saved, because the object for which the goods were thrown overboard was not attained. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident shall contribute to the loss sustained by those whose goods were cast out upon the former occasion.<sup>a</sup> Magens, in his preliminary Essay on Insurances, advances a different doctrine, and contends that, if a ship be saved by throwing goods overboard, and afterwards perish by another calamity, the goods saved shall not contribute to the former loss. He puts a case to illustrate his meaning; but the ordinances above referred to, as will appear from the abstract of them in the preceding paragraph, directly contradict his positions, although he seems to have had those ordinances in view when he advanced them. It was necessary to say thus much, because the doctrines of such an useful writer are often received implicitly; erroneous opinions are adopted and confirmed, because they are not accurately examined; and the more respectable the writer is, the greater is the danger which is to be apprehended. But what is still more remarkable, in the very next paragraph to that I last mentioned, he puts a similar case, in which he admits that the goods saved ought to contribute.<sup>b</sup>

The writers upon this subject have stated, with much minuteness and accuracy, the various accidents and charges that will entitle the party suffering to call upon the rest for a contribution. I doubt whether it be necessary to be so particular in this place; because we may gather in general from the description given of average at the beginning of this chapter, that all losses which arise in consequence of extraordinary sacrifices made for the sake of all come within the description of general average. Mark, a *sacrifice*, or something given up *out of the usual course*, and for the sake of all. For instance, the *Nancy*, to escape from a French privateer, carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and lost the head of her mainmast, but finally succeeded in getting away; held, a common sea-risk, and not a *sacrifice*, or a thing *given up to save the whole*.<sup>c</sup> It was also so adjudged, where a part of the cargo was sold to raise money at a port to which the ship had put back for the repair of damage incurred by ordinary perils of the sea.<sup>d</sup> Neither is the *expense of repairing a ship* injured by successfully resisting and

CHAP. VII.

In what cases claim-  
able.

<sup>a</sup> Code de Com. l. 2, Tit. 11, 16; Ord. of Hamb. 2 Mag. 240; Ord. of Rot. 2 Mag. 98.

<sup>b</sup> 1 Mag. 57.

<sup>c</sup> Covington v. Roberts, 2 N. R. 378;

Power v. Whitmore, 4 M. & S. 141; Dobson v. Wilson, 3 Camp. 487; Taylo v. Curtis, 2 Marsh, 309.

<sup>d</sup> Hallett v. Wigram, 9 C. B. 580.



Park on Insurance. beating off a privateer (thus reaching her destination in safety) nor of curing the wounds of the sailors received in the action, nor the ammunition expended in the engagement, the subject of general average.<sup>a</sup> When a ship was run foul of by another, and the captain was obliged to cut away the rigging, and to return to port to repair it, without which it was found the vessel could not have prosecuted her voyage, nor have kept the sea with safety, the court held that the expenses of repairs, so far as they were absolutely and unavoidably necessary for the general safety of the whole concern, but no further, and the unloading for the purpose of repairs, became general average; but that the captain's expenses during the unloading, repairs, and reloading, were not so, nor was crimpage to replace deserted seamen during the repairs.<sup>b</sup> Under a like state of facts, the wages and provisions of workmen hired for the repairs were deemed to be the subject of general average.<sup>c</sup> In the case cited, the master was compelled to cut away the rigging in order to preserve the ship, and afterwards put into port to repair that which he had so sacrificed. But where the damage incurred was by tempest, and there was no sacrifice of any rigging or the like, indeed only of the master's time and patience, it was held by the same court, that neither the wages and provisions of the crew nor the expenses of repairs, were the subjects of general average.<sup>d</sup> No claim for general average can arise from an act done to redeem the master from imprisonment, as if a part of the cargo were sold for that purpose or the like.<sup>e</sup>

It is not only the value of the goods thrown overboard that must be considered in a general average, but also the value of such as receive any damage by wet, &c., from the jettison of the rest.<sup>f</sup>

What  
things  
liable.

By the ancient laws of Rhodes, Oleron, and Wisbuy, the ship and all the remaining goods shall contribute to the loss sustained.<sup>g</sup> The most valuable goods, though their weight should have been incapable of putting the ship in the least hazard, as diamonds or precious stones, must be valued at their just price in this contribution, because they could not have been saved to the owners but by the ejection of the other goods. Neither the persons of those in the ship, nor the ship provisions, nor respondentia bonds, suffer any estimation;<sup>h</sup> nor does wearing apparel in chests and boxes, nor do such jewels as belong to the person merely; but if the jewels are a part of the cargo, they must contribute. Those who carry jewels by sea ought to communicate that circumstance to the master; because the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things; and hence their preservation will be a common benefit.<sup>i</sup> Both by law and custom, the wages of sailors are not to contribute to the general loss, a provision intended to make this

<sup>a</sup> Taylor v. Curtis, 2 Marsh. 309.

<sup>b</sup> See Plummer v. Wildman, 3 M. & S. 482, as explained by Power v. Whitmore and Hallett v. Wigram.

<sup>c</sup> Da Costa v. Newnham, 2 T. R. 407.

<sup>d</sup> Power v. Whitmore, 4 M. & S. 141

<sup>e</sup> Dobson v. Wilson, 3 Camp. 487.

<sup>f</sup> Reawes, 148; Molloy, l. 2, c. 6, s. 8.

<sup>g</sup> De Leg. Rhod. s. 2, art. 8; Oler. art. 8; Wisb. art. 20; Molloy, l. 2, c. 6, s. 4.

<sup>h</sup> Joyce v. Williamson, 3 Dougl. 164.  
<sup>i</sup> Mag. 63.

description of men more easily consent to a jettison, as they do CHAP. VII.  
not then risk their all, being still assured that their wages will be  
paid.<sup>a</sup>

*The way of fixing a right sum*, by which the average ought to be How com-  
computed, can only be, by examining what the whole ship, freight, puted.  
and cargo, if no jettison had been made, would have produced net,  
if they had all belonged to one person, and been sold for ready  
money. And this is the sum whereon the contribution should be  
made, all the particular goods bearing their net proportion.<sup>b</sup> In no  
respect whatever do the ordinances of foreign states differ so much  
as in the manner of settling the contribution of the ship and freight.<sup>c</sup>  
In some places, the ship contributes for the whole of her value and  
freight; in others, for the half of her value and one-third of her  
freight; and again, in others both ship and freight are to contribute  
for one-half. By the laws of Königsberg, Hamburg, and Copen-  
hagen, the ship is to contribute for the whole of her value and  
freight. They also declare that the value of the ship shall be that  
which she was worth when she arrived, and that from the freight a  
deduction shall be made of the men's wages, pilotage, and such  
other charges as come under the name of petty average, of which  
it is customary everywhere, as we have before observed, for the  
cargo to bear two-thirds and the ship one.<sup>d</sup> By our law I think  
from what we may collect that the ship, freight,<sup>e</sup> and cargo are to  
bear an equal and proportional part of what was so sacrificed for the  
common good.

The sea-laws of different countries vary no less than upon the  
former question, in fixing at what prices goods thrown overboard  
shall be estimated, and for what value those saved are to contribute.  
By the ordinances of Rotterdam, Stockholm, and Copenhagen,  
if the accident which occasioned the general average happened  
before half the voyage was performed, the jettison was to be esti-  
mated at prime cost; but if after that period, then at the price for  
which such goods would sell at the place of discharge, freight,  
duties, and ordinary charges deducted.<sup>f</sup> That distinction is now,  
however, exploded in England, and the custom has become general  
of estimating the goods saved and lost at the price for which the  
goods saved were sold, freight and all other charges being first de-  
ducted.<sup>g</sup> This rule is agreeable to the marine laws of Wisbuy, which  
declare that the goods thrown overboard shall be brought into a  
gross average, and shall be rated at the same price for which other  
merchandise of the same sort preserved from the sea or enemy was  
sold.<sup>h</sup> This custom mentioned by Molloy was certainly new in  
England at the time he wrote; for it appears by Malynes, that in  
1622, the distinction was observed of estimating the goods at prime  
cost, if the jettison happened before half the voyage was performed;  
and if after, at the price the rest of the goods sold for at the place

<sup>a</sup> 1 Mag. 71.

<sup>b</sup> 1 Mag. 69.

<sup>c</sup> Codes of Genoa and France.

<sup>d</sup> 2 Mag. 207, 287, 339.

<sup>e</sup> *Da Costa v. Newnham*, 2 T. R. 407;

*Williams v. L. Ass. Co.* 1 M. & S.  
318.

<sup>f</sup> 2 Mag. 100, 285, 339.

<sup>g</sup> Molloy, tit. Average, s. 15.

<sup>h</sup> Leg. Wisb. art. 20.

*Park on Insurance.* of discharge.<sup>a</sup> However, Molloy is a more modern authority; and Magens says, that the prevailing mode of settling averages now adopted in England is conformable to that rule, which has abolished the distinction. Gold, silver, and jewels, at most places contribute to a general average, according to their full value, and in the same manner as any other species of merchandise.<sup>b</sup> It has been said, that an immemorial custom has prevailed at Amsterdam, that gold and silver shall only contribute for half their value: the reason for such a custom one is at a loss to conjecture. In England no such custom prevails, but money and jewels must fall into the general average at their full price; and a modern writer assures us, that the practice was such in London when he wrote;<sup>c</sup> and such I believe it to be at this day; and the doctrine here advanced was mentioned and confirmed by Mr. J. Buller as clear law.<sup>d</sup>

When contribution made.

The contribution is in general not made till the ship arrive at the place of delivery;<sup>e</sup> but accidents may happen, which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, by the damage suffered soon after sailing, is obliged to return to her outset port; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.<sup>f</sup>

Extent of underwriter's liability.

Thus I have endeavoured to lay before the reader an idea of what is meant by average; and, in order to do that more distinctly, I have defined what average is; I have shown its origin, and what the necessary requisites are to render the act, whence averages arise, legal. I then stated, in general, what accidents or expenses would authorise the sufferer to call for a contribution; the different kinds of property that were subject to such contribution; and lastly, the mode by which the value of this property was to be ascertained. It only remains now to state that the insurers are liable to pay the insured for all expenses arising from general average, in proportion to the sums they have underwritten. Roccus says,<sup>g</sup> "Jactu facto, ob maris tempestatem, pro sublevanda navi, an teneantur assecuratores ad solvendum æstimationem rerum jactarum domino ipsarum? Dic eos non teneri, quia pro rebus jactis fit contributio, inter omnes merces habentes in illa navi pro solvendo pretio domini ipsarum, et ideo si assecuratus recuperat pretium rerum jactarum, non potest agere contra assecuratores; tamen tenentur assecuratores ad reficiendum illam ratam et portionem, quam solvit assecuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi, quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur assecuratores." The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of Europe, as well as to those of England, where the insurer, by his contract, engages to indemnify against all losses arising from a general average.

<sup>a</sup> Lex Merc. 1st part, s. 26.

<sup>b</sup> 1 Mag. 62.

<sup>c</sup> Molloy, tit. Average, s. 4; 1 Mag.

62.

<sup>d</sup> Peters v. Milligan, sit. at Guildh.

after Mich. 1787.

<sup>e</sup> Roccus de Nav. Not. 96.

<sup>f</sup> 1 Mag. 60.

<sup>g</sup> Roccus de Ass. Not. 62.

In general, it seems better to apply for contribution to a court of equity, where effectual relief may be obtained against all the parties in one suit.<sup>a</sup> A shipper of goods may maintain an action at law for general average, as well as the owner of the ship.<sup>b</sup>

The owner having effected an insurance does not affect his right to general average; for the law of average and contribution had existed for ages before the practice of insurance was known.<sup>c</sup>

## CHAPTER VIII.

### SALVAGE.<sup>d</sup>

SALVAGE is so necessarily connected with the two former chapters, that it will be proper to take it into consideration here, before we proceed to the other parts of this inquiry. By the law of England, every person who acts or is employed in any way in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the *life* of any person on board the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan, or derelict, or of any anchors, cables, tackle, stores, or materials which may have belonged to any ship or vessel, is entitled to a *reasonable* reward.<sup>e</sup> The propriety and justice of such an allowance must be evident to every one; for nothing can be more reasonable than that he who has recovered the property of another from imminent danger, by great labour, or, perhaps, at the hazard of his life, should be rewarded by him who has been so materially benefited by that labour.<sup>f</sup> Accordingly, all maritime states, from the Rhodians down to the present time, have made certain regulations, fixing the rate of salvage in some instances, and leaving it, in others, to depend upon the particular circumstances;<sup>g</sup> and the law of England, the decisions of which are not surpassed by those of any other nation in justice and humanity, was not backward in adopting a doctrine so equitable in its nature and so beneficial to those whose property was endangered.<sup>h</sup>

The two main ingredients in all salvage-service are—the danger to which the property is exposed, and the danger encountered by the claimants in its rescue: upon these two particulars mainly depends the measure of compensation.<sup>i</sup> The Court of Admiralty had no power

<sup>a</sup> Com. Dig. tit. Ch. 2 c.; Shepherd v. Wright, Shower's P. C. 18.

<sup>b</sup> Berkeley v. Presgrave, 1 East, 220; Dobson v. Wilson, 3 Camp. 487.

<sup>c</sup> Price v. Noble, 4 Taunt. 123.

<sup>d</sup> See Smith's Merc. L., tit. *Salvage*, post, p. 251.

<sup>e</sup> 9 & 10 Vict. c. 99, s. 19; the West-

minster, 1 Wm. Rob. 229; the D. of Manchester, 1b. 475; the Ocean, 2 1b. 96.

<sup>f</sup> Kaim's Princ. of Eq. Intr. p. 6.

<sup>g</sup> Leg. Rhod. s. 2, art. 65, 46, 47.

<sup>h</sup> See Hartford v. Jones, 1 Ld. Raym. 393; 9 & 10 Vict. c. 99, s. 19.

<sup>i</sup> n. (e.)

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before 9 & 10 Vict. c. 99, to decree a salvage-reward for the preservation of *life* only.<sup>a</sup> Again, salvage-reward is for benefit actually conferred in the preservation of life or property, and not for mere meritorious exertions.<sup>b</sup> The officers and crews of H.M.'s ships are entitled to salvage-reward upon the same footing as other salvors.<sup>c</sup> So may a pilot be entitled to it.<sup>d</sup>

Salvors, it should also be observed, may be curtailed, or even deprived altogether of the remuneration, through error, misconduct, or want of skill or capacity in the performance of the service. Even when essential service has been rendered to a vessel, subsequent misconduct may produce a forfeiture of it.<sup>e</sup>

Amount on wreck.

Amount on recapture.

As the propriety of such an allowance is admitted by all, the only difficulty that can arise upon the subject is to ascertain in what proportions these gratuities and rewards must be allowed. The laws of Rhodes fixed the rate of salvage in several instances, sometimes giving  $\frac{1}{3}$ th of what was saved, at other times only  $\frac{1}{12}$ th, and at others  $\frac{1}{4}$ . The regulations of Oleron left it more unsettled, and declared that the courts of judicature should award to the salvors such a proportion of goods saved as they should think a sufficient recompense for the service performed and the expense incurred.<sup>f</sup> Almost every state has regulations on this head peculiar to itself; and the legislature of this country has, by various statutes, expressed its ideas upon the subject. I shall first consider what rule it has established in cases of *wreck*, and then what the rate of salvage is in cases of *recapture*. When a ship has been *wrecked*, the law of England has followed the laws of Oleron in declaring that reasonable salvage only shall be allowed.<sup>g</sup> In salvage cases the usage of the Admiralty Court, except in the instance of bullion, is to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion.<sup>h</sup> In the apportionment of salvage, the Court is not influenced by the fact of the vessels being insured.<sup>i</sup> We have formerly seen that, when the ships or goods of British subjects were *retaken* from an enemy, the original owner was entitled, by the marine law, to have them restored, upon paying to the recaptors a reasonable salvage, provided the recapture was before condemnation. It was also observed, that the statute law had extended the right of the original owner; so that he was entitled to have his ship and goods restored to him, whether they were retaken after condemnation or before, however distant the time of recapture might be from that of the original taking.<sup>k</sup> The same statute has also fixed the precise rate of salvage which, in the various instances mentioned in the act, the recaptors should be entitled to demand. But the rate of salvage has been since altered, and is now, in all cases, however long the ship has been in the enemy's possession, to

<sup>a</sup> The *Zephyrus*, 2 Wm. Rob. 329.

<sup>b</sup> The *India*, 1b. 408.

<sup>c</sup> The *Wilsons*, 1 Ib. 172; see 16 & 17 Vict. c. 131.

<sup>d</sup> The *Hebe*, 1b. 250.

<sup>e</sup> The *D. of Manchester*, 1 Ib. 475.

<sup>f</sup> Leg. Oler., art. 4.

<sup>g</sup> See 9 & 10 Vict. c. 99, s. 19, "An

Act for consolidating and amending the Laws relating to Wreck and Salvage," *post*, 251.

<sup>h</sup> The *Emma*, 2 Wm. Rob. 309.

<sup>i</sup> The *Devereux*, 1 Ib. 180.

<sup>k</sup> 13 Geo. 2, c. 4, s. 18; 29 Geo. 2, c. 34, s. 24.

the 1/4th if the recapture has been made by any of H. M.'s ships, and CHAP. VIII.  
1/4th if made by a privateer or other ship.<sup>a</sup>

It is said in the statute, that the salvage shall be a proportion of the ships and goods so restored; but a writer upon mercantile law observes, that the wearing apparel of the master and seamen are always excepted from the allowance of salvage.<sup>b</sup> The statute has also said it must be 1/4th, or 1/4th, &c., of the true value. Now, the value of a ship, in order to ascertain the rate of salvage, may be determined by the policy of insurance, if there is no reason to suspect she is undervalued; and the same rule may be observed as to goods where there are policies upon them. If that, however, should not be the case, the salvors have a right to insist upon proof of the real value, which may be done by the merchant's invoices, and they must be paid for accordingly.<sup>c</sup> How adjusted.

The only question then is, how far the insurers are affected by this allowance of salvage. By their own contract, they expressly agree to indemnify the insured against such charges. "And in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate or quantity of his sum herein assured." In *Mitchell v. Edie*,<sup>d</sup> Mr. J. Ashurst said, it seemed to him, that the meaning of this clause was, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment. How insurers affected.

In order to entitle the insured to recover the expenses of salvage, it is not necessary to state them in the declaration as a special breach of the policy; because an insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy.<sup>e</sup> But although the insured may recover from the insurer the expenses of salvage, yet he shall only be entitled to an indemnity, and shall not receive a double satisfaction for the same loss. Thus if the insurer should have paid to the insured the expenses arising from salvage; and afterwards, on account of some particular circumstances, the loss should be repaired by some unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.<sup>f</sup>

From what has been said it will be evident that a loss of salvage is, *per se*, only an average one.<sup>g</sup> Cases, however, may and do frequently arise, where the salvage is so high, the other expenses are so great, and the object of the voyage is so far defeated, that the insured is allowed, by the laws of all trading nations, to abandon his interest in the property saved to the insurer, and to call upon

<sup>a</sup> 43 Geo. 3, c. 160, s. 39.

<sup>b</sup> Beawes, *Lex. Merc.* 147.

<sup>c</sup> *Ib.*

<sup>d</sup> 1 T. R. 608.

<sup>e</sup> *Carey v. King*, Cases temp. Hardw. 304.

<sup>f</sup> *Randall v. Cockran*, 1 Vez. 98.

<sup>g</sup> See *Rosetto v. Gurney*, 11 C. B. 189.

*Park on Insurance.* him to contribute as if a total loss had actually happened. What circumstances shall be deemed sufficient to justify the insured in making such an abandonment, will be the subject of the following chapter,

## CHAPTER IX.

### ABANDONMENT.<sup>a</sup>

WE have formerly seen, that the insured, before he can demand a recompense from the underwriter for a total loss, must cede or abandon to him his right to all the property that may chance to be recovered from shipwreck, capture, or any other peril stated in the policy.<sup>b</sup> It has also been observed, and from the preceding sentence it is obvious, that when we speak of a total loss, with respect to insurances, we do not always mean that the thing insured is absolutely lost and destroyed, but that by some of the usual perils it is become of so little value, as to entitle the insurer to call upon the underwriter to accept of what is saved, and to pay the full amount of his insurance, as if a total loss had actually happened. Indeed, the word abandonment conveys the idea that the whole property is not lost; for it is impossible to cede or abandon that which does not exist. When the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation.<sup>c</sup>

From what has been said, then, it appears that abandonment dates its origin from the period at which the contract of insurance was itself introduced; because insurance being a contract of indemnity, the insured can recover no more than the amount of the loss actually sustained, unless the parties expressly stipulate for more;<sup>d</sup> but if he were allowed to recover for a total loss, and might also retain the property saved, he would be a considerable gainer. Accordingly we find that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world where insurance has been known,<sup>e</sup> and in all those laws the definition of it is the same; namely, that when any goods or ships that are insured happen to be lost, taken, or spoiled, the insured is obliged to abandon such goods or ships for the benefit of the insurers, before he can demand any satisfaction from them. In this respect, also, they

<sup>a</sup> See *Gorham v. Sweeting*, 2 Wms. Saund. 203, n. i.

<sup>b</sup> *Ante*, Ch. VI.; Pothier's *Traité du Contr. d'Ass.* 133.

<sup>c</sup> See *Randall v. Cockran*, 1 Vez. 98;

*Roux v. Salvador*, 3 Bing. N. C. 275; *Chapman v. Benson*, 8 C. B. 950.

<sup>d</sup> *Irving v. Manning*, 6 C. B. 422.

<sup>e</sup> France, Rotterdam, Bilbao, Middleburgh.

seem to be agreed, that when an abandonment is made, it must be a total, not a partial one; that is, one part of the property insured shall not be retained and the other part abandoned; a regulation certainly founded in justice.<sup>a</sup> The propriety and justice of abandoning in certain cases to the insurers being apparent, it will be proper to consider in what cases and under what circumstances the insured is intitled to exercise this power: for although in all cases the insured has a right to say he will not abandon, yet he cannot at his pleasure harass the insurer by saying he will abandon, and thereby turn that which, in its own nature, was only a partial, into a total loss.<sup>b</sup>

In questions of this nature, the opinion of learned foreigners must always have weight, because they are not questions of positive regulation or municipal law, but of general and extensive import, not confined to any particular state, but founded on the great principles of reason, justice, and universal law. But in no country have the principles of abandonment been more accurately defined than in England, and it must be remembered that the decisions from which the following principles are selected are of the greatest authority; that they are not merely the opinions of private speculative men, but the solemn and deliberate judgment of the grave and learned judges of the English courts—judgments formed after mature deliberation and serious argument, some confirmed on appeal to the House of Lords—all established upon the solid and permanent basis of reason and good sense.

From these decisions we gather this general rule: namely, that if the *General subject-matter insured remain in specie*, though in a damaged state, a notice of *abandonment* is necessary to entitle the assured to make a claim as if it had been actually destroyed. But if the property do exist *in specie*, in a damaged state, may he abandon in all cases? No; he can only abandon when he is in a condition to satisfy a jury that an owner, if on the spot and uninsured, and acting prudently, would abandon the adventure.<sup>c</sup>

There may be a total loss of part of the *freight*, but there can be no partial loss of the whole.<sup>d</sup> If the owner of the ship be interested in the freight as well, an abandonment of the ship is an abandonment of all his interest in both ship and freight.<sup>e</sup> But if the loss of freight arise from the abandonment of the ship, and not from a peril issued against, the underwriter is not liable.<sup>f</sup>

In *Roux v. Salvador* the important question arose, whether, when a total loss has taken place before the termination of the risk incurred, with a salvage of a portion of the subject insured, which is

<sup>a</sup> Pothier, 133; Ord. of Lew. 14, art. 47; Ord. of Bilbao, 32.

<sup>b</sup> 2 Burr. 697.

<sup>c</sup> Knight v. Faith, 15 Q. B. 649, and Ld. Campbell's masterly remarks on Cambridge v. Anderton, 2 B. & C. 691, and Roux v. Salvador, 3 Bing. N. C. 275, ante, ch. 6. Allen v. Sugrue, 8 B. & C. 561; Young v. Turing, 2 Sc. N. C. 764; Phillips v. Nairn, 4 C. B. 343;

Reimer v. Ringrose, 6 Exch. 267; Navone v. Haddon, 9 C. B. 44; Rosetto v. Gurney, 11 lb. 176; Fleming v. Smith, 1 H. of Lords' Ca. 513; Gorham v. Sweeting, 2 Wms. Saund. n.

<sup>d</sup> Ib.

<sup>e</sup> Carr v. Davidson, 5 M. & S. 82; Chapman v. Benson, 5 C. B. 330, and 8 lb. 950.

<sup>f</sup> McCarthy v. Abel, 5 East, 397.



*Park on Insurance.* converted into money, the insured is bound to abandon before he can regain for a total loss. But the court said the abandonment

Where part was not in that case necessary; as to the sale it was said: "When is saved and such a sale takes place, and in the opinion of the jury is justified by sold. necessity and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss: and, if there be an insurance, the net amount of the sale, after deducting the charges, becomes money paid and received to the use of the under-

The assured writer, upon the payment by him of the total loss. Mark, the assured may preclude himself from recovering as for a total loss, if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudicial in the recovery of that money."

No obligation to abandon. A party is not in any case obliged to abandon; neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be:<sup>a</sup> on the other hand, a partial loss cannot be converted into a total by notice of abandonment.<sup>b</sup>

An abandonment to the underwriter on ship transfers to him, not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage.<sup>c</sup>

A notice of abandonment is still necessary, though the ship or cargo has been sold and converted into money when the notice of the loss is received.<sup>d</sup>

In *Knight v. Faith* the question was raised, whether notice of abandonment might be dispensed with when there has lawfully been a sale by the master, but as the sale there was not shown to be lawful, the court declined to express any opinion therein.<sup>e</sup>

Requisites of notice.

*The notice of abandonment* may be by parol or by word of mouth; but the prudence of giving it in writing, and of using the word *abandon*, is too obvious to need further remarks. It should be express and direct,<sup>f</sup> and unconditional.<sup>g</sup> It must be an abandonment of the whole and not of part.<sup>h</sup> It must be given within a *reasonable time* after the assured has received intelligence of the loss, and extent of damage has been ascertained.<sup>i</sup> But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. Because the reason why notice of abandonment is deemed necessary, is to prevent surprise and fraud upon the underwriter, but in the case

<sup>a</sup> n. b.; and *Mellish v. Andrews*, 15 East, 13.

<sup>b</sup> *Fleming v. Smith*, 1 H. of L. Ca. 513; *Stewart v. G. M. Ins. Co.*, 2 H. of L. 359.

<sup>c</sup> *Carr v. Davidson*, 5 M. & S. 79.

<sup>d</sup> *Hodgson v. Blakiston*, Sitt. after Hil. T., 38 Geo. 3, K. B.

<sup>e</sup> 15 Q. B. 656.

<sup>f</sup> *Thelluson v. Fletcher*, 1 Esp. 73; *Parmeter v. Todhunter*, 1 Camp. 541.

<sup>g</sup> *Ib.*; and *McMasters v. Shoolbred*, 1 Esp. 237.

<sup>h</sup> *Marsh*, 600; 2 Wms. Saund. 203, n.

<sup>i</sup> *Mitchell v. Edie*, 1 T. R. 608; *Mellish v. Andrews*, 15 East, 15; *Alldridge v. Bell*, 1 Stark. 498; *Gorham v. Sweeting*, 2 Wms. Saund. 203, n.

put, they have, by their own act, superseded the necessity of CHAP. X. notice.<sup>a</sup>

It seems to have been formerly thought that, if the right of abandonment once vested, and was acted upon in time, it could not afterwards be divested by subsequent intelligence of other circumstances and events; but this is not so now.<sup>b</sup> Once a total loss, always so, is no longer a principle of our insurance law.<sup>c</sup>

We have thus taken a view, in this and the eight preceding chapters, of the nature of that instrument by which the contract of insurance is effected; and of the different modes by which it may be construed. We have treated of the various losses, to which the underwriter subjects himself by that contract; we have shown when the losses are to be considered as partial, when as total; and in what cases, and under what circumstances, the insured shall be allowed to abandon to the underwriter. The course of our inquiry now naturally leads us to observe in what instances the insurer is discharged from any responsibility; either on account of the contract being void from its commencement, by reason of some radical defect; or because the insured has failed to perform some of those conditions necessary to be fulfilled on his part, before he can call upon the insurer for an indemnity.

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## CHAPTER X.

### FRAUD.

IN treating of those causes which make policies void from the beginning, or, in other words, which absolutely annul the contract, it will be proper, in the first place, to consider how far it will be affected by any degree of fraud. In every contract between man and man, openness and sincerity are indispensably necessary to give it its due operation; because, fraud and cunning once introduced, suspicion soon follows, and all confidence and good faith are at an end. No contract can be good unless it be equal; that is, neither side must have an advantage, by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured; and therefore it is absolutely necessary to the justice and validity of the contract that this account be exact and complete. Accordingly, the learned judges of our courts of law, feeling that the

<sup>a</sup> *Da Costa v. Newnham*, 2 T. R. 340; *Gorham v. Sweeting*, 2 Wms. 407. *Saund.* 203, i.

<sup>b</sup> *Bainbridge v. Neilson*, 10 East, <sup>c</sup> *Ib.*

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Kinds of fraud.

very essence of insurance consists in a rigid attention to the purest good faith and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment.<sup>a</sup> After what has been said, it will hardly be necessary to mention that both parties, the insurer and insured, are equally bound to disclose circumstances that are within their knowledge; and, therefore, if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void as if the insured had concealed from him some accident which had befallen the ship.<sup>b</sup> In perusing the numerous cases and decisions which, I am sorry to say, are to be found in our books under this head, it occurred to me that they were liable to a three-fold division: 1st, The allegation of any circumstances, as facts, to the underwriter, which the person insured knows to be false; 2ndly, The suppression of any circumstances which the insured knows to exist, and which, if known to the underwriter, might prevent him from undertaking the risk at all, or, if he did, might entitle him to demand a larger premium; and lastly, a misrepresentation. The last of these, a misrepresentation, seems to fall under the first head, the *allegatio falsi*; and so, in some measure, it does; because wherever a person knowingly and wilfully misrepresents anything, he asserts a falsehood.<sup>c</sup> But it was thought necessary to make a division for itself; because, if a material fact be misrepresented, though by mistake, the contract is void, as much as if there had been actual fraud: for the underwriter has computed his risk upon information which was false. Of each of these in order.

From the cases under the first head we may collect this principle, that a false assertion in a policy will vitiate the contract, even though the loss happen in a mode not affected by that falsity.<sup>d</sup> An observation is suggested by the perusal of the case of *Woolmer v. Muilman*. It arose upon a warranty; and the learned judges declared that, the warranty being false, there was no contract. Now, as we shall see when we come to the chapter on *Warranties*, the general rule with respect to them is this, that the non-compliance with them does not vacate the contract from the beginning; but it amounts to much the same thing, namely, that the insured, not having complied with those conditions which he had taken upon himself to perform, cannot recover against the underwriter. But the following answer is submitted, which, if allowed, will reconcile any seeming difference that arises in the cases upon the subject. Wherever a man warrants a thing to be true, which at the time he does so he must unavoidably know to be false, it comes under the *allegatio falsi*, and the contract is void, as in the case just reported. But if he warrant or undertake that a certain thing shall be done, for instance, that a ship shall sail with convoy or on a particular day, these being circumstances materially varying the risks, the underwriter shall not be responsible

<sup>a</sup> 2 Black. Comm. 460; Grot. de Jure Belli, lib. 2, c. 12, s. 23; Puff. de Jure Nat. l. 5, c. 9, s. 8; Bynk. Quest. Jur. Priv. l. 4, c. 26; Code de Com. l. 2, tit. 10, s. 1.

<sup>b</sup> Carter v. Boehm, 3 Burr. 1909.

<sup>c</sup> Dougl. 247.

<sup>d</sup> Woolmer v. Muilman, 3 Burr. 1419; McIntosh v. Marshall, 11 M. & W. 116; Elkin v. Janson, 13 Yb. 659.

or a loss if they are not complied with: but the contract is not void from the beginning, nor does the insured incur any moral guilt, because they do not depend entirely for their performance upon the will of the person insured, nor could they be within his knowledge at the time he entered into the contract. A short time after the case of *Woolmer v. Muilman* had been decided, another very similar case came on at Guildhall, before Ld. Mansfield.<sup>a</sup> It was an action on a policy of insurance on goods laden on board such a ship, warranted a Portuguese. The insurance was made during the French war, when the premium would have been much higher on an English ship. The plaintiff gave partial evidence of her being a Portuguese, and that she was obliged, on account of perils of the sea, to put into a French port, by which the cargo was spoiled. This was admitted by the defendant, who contended that, during her stay at the French port, she was libelled, and condemned as not being Portuguese; and that, though the goods were lost by a different peril, yet in fact the ship was not Portuguese (being insured as such), and that this vitiated the policy *ab initio*, and this was agreed to be law. In order to prove that she was not Portuguese, the defendant produced the sentence of condemnation, and the confirmation thereof in the courts of France: and an answer of the present plaintiff in the Court of Chancery here, by which it was admitted, that the ship was condemned as not being, or under pretence of not being, Portuguese. Ld. Mansfield:—"As the sentence is always general (without expressing the reason of the condemnation), attested copies of the libel ought, in strictness, to have been produced, to show upon what ground the ship was libelled against. But, as the plaintiff has by his answer in Chancery admitted that she was condemned as not being Portuguese, when added to the expression used in the sentence of confirmation, that the ship was condemned in the court of prizes, there is sufficient evidence for us to proceed upon." The defendant, the underwriter, had a verdict.

The second species of fraud which affects insurances is the concealment of material circumstances *known only to one of the parties entering into the contract*. Upon this head the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of material circumstances vitiates all contracts, upon the principles of natural law.<sup>b</sup> Insurance is a contract of speculation. The facts upon which the risk is to be computed lie, for the most part, within the knowledge of the insured only. The underwriter must therefore rely upon him for all necessary information, and must trust to him that he will conceal nothing material, so as to make him form a wrong estimate.<sup>c</sup> *If a mistake happen, without any fraudulent intention, still the contract is annulled*, because the risk is not the same which the underwriter intended. As well expressed in a recent case, material mis-statement or concealment vitiates the contract; and whether it be *fraudulently* made or not is a matter which is wholly immaterial, except with reference to the return of the pre-

<sup>a</sup> *Fernandez v. De Costa*, Sitt. after Hil. T. 4 C. 3.

<sup>b</sup> 1 Black. Rep. 465.

<sup>c</sup> 1b. 594.

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mium.<sup>a</sup> Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his belief of the contrary.

I need hardly repeat, that it is the concealment of *private* facts, not of *public* facts, or conclusions from facts, that vitiates the policy.<sup>b</sup>

In the words of *Ld. Mansfield*, "There are many matters as to which the insured may be innocently silent; he needs not mention  
**What facts.** what the underwriter knows—*scientia utrinque par pares contrahentes facit*. An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured needs not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as, for instance, the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils, from the ruptures of states, from war, and the various operations of war. He is bound to know the probability of safety, from the continuance and return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war, by sea and on shore, from ports to ports, and from places to places, anywhere, he needs not be told the secret enterprises upon which they are destined; because he knows some expedition must be in view, and, from the nature of his contract, he waives the information, without being told. If he insures for three years, he needs not be told any circumstance to show it may be over in two; or if he insure a voyage with the liberty of deviation, he needs not be told what tends to show there will be no deviation. Men argue differently from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both; each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other. The reason of the rule which obliges the parties to disclose is to prevent fraud and encourage good faith; it is adapted to such facts as vary the nature of the contract, which one privately knows and the other is ignorant of and has no reason to suspect. The question, therefore, must always be, 'Whether there was, under all circumstances, at the time the policy was underwritten, a fair statement or a concealment, fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run.'"  
**Materiality of fact.** The *materiality* of a fact suppressed is not a question of law, but a question of fact, to be decided by a

<sup>a</sup> *Anderson v. Thornton*, 8 Exch. 427; *Carter v. Boehm*, 3 Burr. 1905; 1 Black. 593, S. C.; *Gladstone v. King*, 1 M. &

S. 37; *Elkin v. Janson*, 13 M. & W. 655.

<sup>b</sup> *Carter v. Boehm*, 3 Burr. 1905.

jury; and the proper evidence to guide them is that of persons conversant with the subject-matter of the inquiry. Such a person may be asked whether the communication of such a fact would have enhanced the premium, but he cannot be asked what he himself would have done in the particular case.<sup>a</sup>

3rd. We come now to the third great division of this chapter, namely, to cases in which policies are void by *misrepresentation*. Before we proceed to state the cases under this head, it will be proper to distinguish between a *warranty* and a *representation*. A warranty or condition is that which makes a part of the written policy, and must be literally and strictly performed; and being a part of the agreement, nothing tantamount will do or answer the purpose. A representation is a state of the case, not a part of the written instrument, but *collateral* to it, and entirely independent of it;<sup>b</sup> and it is sufficient that a representation be substantially performed.<sup>c</sup> The consequence of a breach of a warranty we shall take notice of hereafter. If there be a misrepresentation, it will avoid the policy as a *fraud*, but not as a part of the agreement.<sup>d</sup> Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is absolutely necessary to make them a part of the instrument by which the contract of indemnity is effected. If a representation be false in any material point (although it happens by mistake, and without any fraudulent intention or improper motive on the part of the insured), it will avoid the policy; and if the point be not material, the representation can hardly ever be fraudulent. The principle upon which the policy is void in such a case, we stated in the opening, that the underwriter has computed the risk upon circumstances which were false or which did not exist. These doctrines are fully established by a variety of judicial decisions.<sup>e</sup> As has been said before, and as will appear from the cases cited, in order to vitiate the contract, the thing concealed must be material, it must be some fact, and not merely a *supposition* or *speculation*, or statement by way of inference and computation of the insured; and the underwriter must take advantage of any misrepresentation the first opportunity, otherwise he will not be allowed to claim any benefit from it at a future period. If therefore the insured merely represent that he expects a thing to be done, the contract will not be void, although the event should turn out very different from his expectation.<sup>f</sup>

A representation to the *first* underwriter is considered as made to all those who afterwards underwrite the policy.<sup>g</sup> It has been determined in a variety of cases that a representation to the *first* underwriter extends to the others.

There is another rule upon this subject, which it is material par-

<sup>a</sup> Rickards v. Murdock, 10 B. & C. 527; Berthon v. Loughman, 2 Stark. 258.

<sup>b</sup> Weston v. Emes, 1 Taunt. 107.

<sup>c</sup> Pawson v. Watson, Cowp. 785.

<sup>d</sup> See Dougl. 271, and Elkin v. Jan-son, 13 M. & W. 659.

<sup>e</sup> McDowall v. Fraser, Dougl. 247; Shirley v. Wilkinson, 1b. 293.

<sup>f</sup> Barber v. Fletcher, Dougl. 305;

Brine v. Featherstone, 4 Taunt. 869;

Bowden v. Vaughan, 10 East, 414.

<sup>g</sup> Bell v. Carstairs, 2 Camp. 544.

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particularly to mention, although it may be collected from almost all the cases that have already been quoted; and it is applicable to each of the three branches into which this chapter has been divided.

*Agents' acts.*

Wherever there has been an allegation of a falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether such allegation or concealment be the act of the person himself who is interested, or of his *agent*, for in either case the contract is founded in deception, and the policy is consequently void.<sup>a</sup> The reason of this rule is nothing more than that which the law of England has for general convenience adopted in treating of the relation between master and servant, declaring, that the master must always be responsible for the act of his servant, if done by his express or implied command. It would indeed be of very mischievous consequence, if a man might shelter himself from responsibility of any kind by throwing the blame upon his agent; it would be to allow him to contradict a maxim of law, which says that no man shall be suffered to make any advantage of his own wrong; and would overturn that wise principle of equity, that when one of two innocent persons (for the master may without danger to the argument be supposed innocent) must suffer by the fraud or negligence of a third, he who gave credit to that third person shall bear the consequences arising from the confidence so reposed. If this be true, and it cannot be denied, of contracts in general, it must also be admitted in those of insurance, where, from the very nature of the case, the business is seldom transacted by the parties themselves, but is most commonly effected by the interposition of agents or brokers. The courts of justice have accordingly held, that any fraud in the agent of the insured vitiates and annuls the contract, as much as direct fraud in the insured himself; and this, although the act cannot be traced at all to the owner of the property, or even though he should be perfectly innocent.

To have troubled the reader with all the cases that have come to trial upon the ground of fraud, would have swelled this chapter to the size of a volume, and at the same time would be wholly unnecessary, as every case of fraud must depend upon its own circumstances. It was thought sufficient to lay down the general principles which the courts have adopted upon the subject, and which are applicable to each division of it, as stated in the beginning of this chapter, and to cite two or three cases under each head, in order to confirm and illustrate the positions and principles advanced. But as fraud is a charge of a very serious nature, materially affecting a man's credit, character, and reputation, the law of England will never presume that any one is guilty of it, nor set aside a contract on that ground, unless it be fully and satisfactorily proved. The consequence of this favourable presumption is, that the burden of proof lies upon the person who wishes to avail himself of the fraudulent conduct imputed. Thus if the insured is supposed to be guilty of fraud, the proof of it falls upon the underwriter, because he is the person who is to derive a benefit from substantiating the

*Evidence of fraud.*

<sup>a</sup> *Fitzherbert v. Mather*, 1 T. R. 15; *Rickards v. Murdock*, 10 Ib. 527.  
*Lindinau v. Desborough*, 8 B. & C. 586;

charge.<sup>a</sup> This is not only the law of England, but the law of common sense, founded on principles of equity and justice.<sup>b</sup> Although it has been said that fraud will not be presumed unless it be fully and satisfactorily proved, it is not intended to convey an idea, that there must be a positive and direct proof of fraud, in order to annul the contract. The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of such evidence; and therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villany would ensue, and pass with impunity. Circumstantial evidence is all that can be expected, and, indeed, all that is necessary, to substantiate such a charge. The prejudice entertained against receiving circumstantial evidence is carried to a pitch wholly inexcusable. In the case before us we have already shown it must be received, because the nature of the inquiry for the most part admits of no other, and consequently it is the best possible evidence that can be given. But, taking it in a more general sense, a concurrence of circumstances (which we must always suppose to be properly authenticated, otherwise they weigh nothing) forms a stronger ground of belief than positive and direct testimony generally affords, especially when unconfirmed by circumstances. The reason of this is obvious: a positive allegation may be founded in mistake, or, what is too common, in the perjury of the witness; but circumstances cannot lie; and a long chain of well-connected fabricated circumstances requires an ingenuity and skill rarely to be met with, and such a consistency in those who come to support those circumstances by their oaths as the annals of our courts of justice can seldom produce. Besides, circumstantial evidence is much more easily discussed, and much more easily contradicted by testimony, if false, than the positive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot possibly be the subject of contradiction founded merely on presumption and probability.

Another question upon this subject remains to be discussed, and that is, whether the underwriter is bound to *return the premium*, or is liable to an action for it, in a case where fraud has been proved against the insured, and consequently where the contract is void, and no risk has been run. In several instances before Ld. Mansfield's time in the Court of Chancery, when the underwriters had been relieved from the payment of the sums insured on the ground of fraud, the decree directed a return of the premium.<sup>c</sup> At last the question came before the common law courts, and the law now is, that in all cases of *actual fraud* on the part of the assured or his agent, the underwriter may retain the premium. On the other hand, if a policy be avoided on account of a misrepresentation made without *any fraud*, the assured is entitled to a return of it.<sup>d</sup> If the underwriter be guilty of fraud, an action will lie against him at the suit of the assured, to recover the premium.<sup>e</sup>

<sup>a</sup> See *McIntosh v. Marshall*, 11 M. & W. 127; *Elkin v. Janson*, 13 Ib. 655.

<sup>b</sup> *Roccus*, Not. 51, 78.

<sup>c</sup> See *De Costa v. Scandret*, 2 P. Wm. 170.

<sup>d</sup> *Feise v. Parkinson*, 4 Taunt. 639.

<sup>e</sup> *Carter v. Boehm*, 3 Burr, 1909.



## CHAPTER XI.

## SEAWORTHINESS.

Park on In- insurance. HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of insurance, we proceed to show that other circumstances, in which no fraud whatever can be discovered or even suspected, will also vitiate and annul the policy. Of this nature is the doctrine of *seaworthiness*. Upon this point it has been determined, that every ship insured, whether on a time or voyage policy, must, *at the commencement of the risk*, be in a condition to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract; and the insurers are discharged. This doctrine is founded upon that general principle of insurance law, that the insurers shall not be responsible for any loss arising from the insufficient or defective quality or condition of the thing insured. There is in the contract of insurance a tacit and implied agreement that everything shall be in that state and condition in which it ought to be, and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy, for he ought to know that she was so. The ship is the substratum of the contract between the parties; a ship not capable of performing the voyage is the same as if there were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; because such a defect is not the consequence of any external misfortune or any unavoidable accident arising from the perils of the sea or any other risk, against which the underwriter engages to indemnify the person insured. To support a contrary doctrine would introduce a variety of frauds, as it would probably subject the underwriter to account for the loss, diminution, or waste, which may happen from the necessary and ordinary use of the thing insured; or the wear and tear of the ship in the common course of the voyage; and all of these are risks, to which the insurer has never been considered as exposed. From what has been said, it appears that the ground of decision in this case is perfectly distinct from any principle of fraud; that it depends merely upon this, that the insured is presumed to be better acquainted with the state and condition of his ship than any other man.

But does this seaworthiness refer to the time of the insurance, the commencement of the risk, or to the whole of the voyage? Again, what is meant by the word *seaworthiness*? These are questions, from the settled state of our law on the subject, easily answerable.\* The general rules and remarks deducible from the authorities are these:--

\* *Hollingsworth v. Broderick*, 7 A. & 415; 8 Ib. 900; *Small v. Gibson*, 16 E. 40; *Dixon v. Sadler*, 5 M. & W. Q. B. 128.

1. That there is no implied warranty of seaworthiness as regards a CHAP. XI. voyage policy, except at the commencement of the risk. 2. That if the ship be then seaworthy, the implied warranty is satisfied, and the assured cannot be made, by implication, responsible for subsequent deficiency occasioned even by the actual misconduct of the master or crew. 3. That, as regards a *time* policy, there is not an implied warranty that the ship is seaworthy, wherever she may be, or however situated at the commencement of the risk, but only that she is seaworthy so far as the assured could provide for her being so when the risk commenced: for example, if she was in a port at the time, that she was in a proper condition for such a port; if at sea, that she was fit for sea. The word *seaworthiness* implies, as well in a time as in a voyage policy, that she must be in a fit state as to repairs, equipment, crew, and in all other respects, to encounter the hazard of the situation in which she is placed when the risk attaches.<sup>a</sup> If the policy attaches before the voyage commences, it is enough that the state of the ship be commensurate to the *then* risk.<sup>b</sup> If the voyage be such as to require a different complement of men or state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of *each* stage of the navigation, properly manned and equipped for it. If she become unseaworthy afterwards, it must be used, if at all, as evidence of her condition at the time required by the warranty at the commencement of the risk. In *Redmond v. Smith*,<sup>c</sup> the master had not entered into ship's articles with the seamen, pursuant to 5 & 6 Wm. 4, c. 19, s. 2; and it was pleaded that the ship was therefore unseaworthy; but the court said it could see nothing in the non-signature of the ship's articles which would prevent the crew from keeping the vessel afloat, and decided against the plea. Now, although true as a general rule, that she must be seaworthy at the commencement of the risk, as a condition previous to the vesting of any right in the insured to recover, yet it is not true as an universal proposition: for example, a ship is unseaworthy by mistake (as from too large a cargo or from want of an anchor); if the defect be afterwards discovered and remedied before any loss happen, a subsequent loss, not attributable to such defect, falls upon the underwriter.<sup>d</sup>

To avoid disputes of this kind it is not unusual for underwriters to admit by the policy the ship's seaworthiness, which will, in general, operate as an estoppel upon them, not only in the event of a loss happening from unseaworthiness itself, but from any of the perils insured against.<sup>e</sup>

Lastly, where the ship is not seaworthy, the policy of insurance is void, as well where the insurance is upon the *goods* to be conveyed

<sup>a</sup> *Small v. Gibson*, *supra*; as to *equipments*, see *Wedderburne v. Bell*, 1 Camp. 1; *Farmer v. Legg*, 7 T. R. 186; *Wilkie v. Geddes*, 3 Dow. 57; as to *competency* of captain and crew, *Tait v. Levy*, 14 East, 481; and of *pilots*, *Law v. Holingworth*, 7 T. R. 100.

<sup>b</sup> *Smith v. Surridge*, 4 Esp. 25; *Annen v. Woodman*, 3 Taunt. 299.

<sup>c</sup> 2 D. & L. 288.

<sup>d</sup> *Weir v. Aberdeen*, 2 B. & A. 320.

<sup>e</sup> *Parfit v. Thompson*, 13 M. & W. 394.

Park on Insurance. in the ship as when it is upon the *ship* itself. For, whenever a case arises with respect to damage done to goods through the insufficiency of the ship, the question whether the master or owner is liable to make good the loss depends upon ascertaining whether the ship was in a condition to encounter the hazards of the situation in which she was placed when the risk attached, or became defective from bad weather and the perils of the wind and sea.<sup>a</sup>

## CHAPTER XII.

### ILLEGAL VOYAGES.

WE proceed now to the consideration of another circumstance by which the contract of insurance is vacated and annulled *ab initio*, and it is this, that whenever an insurance is made on a *voyage* expressly prohibited by the law of the country, *the policy* is of no effect;<sup>b</sup> and it is equally clear that the policy is void, if prohibited by a statute, though this statute inflicts a penalty only (because such a penalty implies a prohibition), or whether it have in view the protection of the revenue, or any other object.<sup>c</sup> The principle upon which such a regulation is founded is not peculiar to this kind of contract, for it is nothing more than that which destroys all contracts whatsoever, that men can never be presumed to make an agreement forbidden by the laws, and if they should attempt such a thing, it is invalid, and will not receive the assistance of a court of justice to carry it into execution.<sup>d</sup> If there be any illegality in the commencement of one *entire* voyage, and an insurance be effected on the latter *part* of it, which, taken by itself, would be legal, the assured cannot recover on the policy.<sup>e</sup> If a cargo be licensed, the insurance is not vitiated by an *excess*, or though other part of the cargo be not licensed or illegal.<sup>f</sup> Though an insurance upon a smuggling voyage, prohibited by the *revenue* laws of this country, would be void under the principle above stated, yet the rule has never been supposed to extend to those cases where ships have traded, or intend to trade, contrary to the *revenue* laws of *foreign* countries, because *no country takes notice of the revenue laws of another*: in such cases, therefore, the policy is good and valid; and if

<sup>a</sup> 2 Val. 16.

<sup>b</sup> See *Redmond v. Smith*, 2 D. & L. 289.

<sup>c</sup> *Cope v. Rowlands*, 2 M. & W. 157.

<sup>d</sup> See *Wetherell v. Jones*, 3 B. & Ad. 226.

<sup>e</sup> *Wilson v. Marryatt*, 8 T. R. 31; *Bird v. Appleton*, *Ib.* 562; *dist. Sewell v. R. E. Ass. Co.*, 4 Taunt. 856.

<sup>f</sup> *Pieschell v. Allnutt*, 4 Taunt. 792; *Parkin v. Dick*, 11 East, 502.

loss happen, the underwriter will be answerable.<sup>a</sup> A voyage to a blockaded port, after notification of the blockade, is not necessarily illegal; for example, she may sail for the purpose of inquiring whether the blockade continue, or of breaking it; in the former case it would be legal, in the latter illegal, and the contract of insurance would stand or fall by the determined character of the voyage.<sup>b</sup>

Insurance of an *enemy's property* against *capture*, *embargo*, and the like, having been fully considered, I may close this head with the general rule of our common law, that all trading with an enemy, without a licence from the crown, is illegal in a British subject.<sup>c</sup> But although all intercourse with the ports of an enemy is illegal in a British subject, for commercial purposes, the case of a natural-born subject domiciled in a neutral country, stands upon a different principle: with him it is innocent.<sup>d</sup> Again, such trade, as above suggested, will be legalized by *royal licence*, the conditions of which must be strictly fulfilled.<sup>e</sup>

## CHAPTER XIII.

### PROHIBITED GOODS.

THE subject of the present chapter is materially connected with that of the foregoing; and indeed follows as a consequence from the doctrine there advanced. We then saw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almost all countries, the exportation and importation of certain commodities are declared to be illegal; to act contrary to that prohibition is clearly a contempt of legal authority; and consequently a moral wrong. If the act itself be illegal, the insurance to protect such an act must also be contrary to law; and therefore void.<sup>f</sup> Agreeably to this principle, it seems to have been laid down by the writers upon the subject, as a general and universal proposition, that an insurance being made, although in general terms, does not comprehend prohibited goods; and therefore when the insured shall procure such commodities to be shipped, the underwriter being ignorant of it, by means of which the ship and cargo are confiscated, the insurer is discharged.<sup>g</sup> In this pas-

Insurer's liability.

<sup>a</sup> *Planché v. Fletcher*, Dougl. 238; *Leon v. Fletcher*, 1 Park. Ina. 360. (7th Edit.)

<sup>b</sup> *Harratt v. Wise*, 9 B. & C. 712; *Naylor v. Taylor*, ib. 718.

<sup>c</sup> *Potts v. Bell*, 8 T. R. 548; see *Browne v. Vigne*, 12 East, 283; and

*Oliverson v. Brightman*, 8 Q. B. 807.

<sup>d</sup> *Bell v. Reid*, 1 M. & S. 726.

<sup>e</sup> *Vandyck v. Whitmore*, 1 East, 475; *Schroeder v. Vaux*, 15 East, 52.

<sup>f</sup> *Lord Kaimes's Prin. of Eq.* 65.

<sup>g</sup> *Roccus de Ass.* No. 21.

Part of Insurance. sage from Roccus it may be inferred, that if the underwriter knew that the goods were prohibited, the insurance would be valid. But we trust it was sufficiently shown in the preceding chapter, that that will not alter the case; because no consent or agreement can render a contract good and valid, which, upon the face of it, is contrary to law. In France this rule was adopted so long ago as the year 1660; for in the work of a very respectable writer of that age we find this passage: "assurances se peuvent faire sur toute sorte de merchandize, pourvu que le transport ne soit pas prohibé par les edicts et ordonnances du roy."<sup>a</sup> And from an authority no less respectable, it appears that the law of France has undergone no alteration since that period; <sup>b</sup> for he says, "that those effects, the importation or exportation of which is prohibited in France, cannot be the subject-matter of the contract of insurance; and if they should be confiscated, the insurers are not responsible, even where the truth has been declared by a special clause in the policy. The assurance is void, and no premium is due." This passage from the celebrated work just referred to, confirms the idea above started, with respect to the knowledge of the underwriter. The law of England, whose commercial regulations have surpassed those of every other nation in the world, has also introduced such a rule into its system of mercantile jurisprudence; and the oldest writers upon the subject have taken notice of it. It is said, "if prohibited goods are laden aboard, and the merchant insures upon the general policy, it is a question whether if such goods be lawfully seized as prohibited goods, the insurers ought to answer. It is conceived they ought not: for if the goods are at the time of the lading unlawful, and the lader knew of the same, such assurance will not oblige the insurer to answer the loss; for the same is not such an assurance as the law supports, but a fraudulent one."<sup>c</sup> But it is not upon the opinions of learned men merely, that this doctrine is founded in the English law; for the legislature have by positive statutes declared their ideas upon the subject. It appears from the preamble of the sect. of the stat. about to be quoted, that a custom, highly prejudicial to the revenue of the country, had prevailed, and was increasing to a very alarming degree, of importing great quantities of goods from foreign states in a fraudulent and clandestine manner, without paying the customs and duties payable to the crown: and that this evil had been encouraged and promoted by some ill-designing men, who, in defiance of the laws, had undertaken as insurers or otherwise, to deliver such goods so clandestinely imported, at their charge and hazard into the houses, warehouses, or possession of the owners of such goods. In order to remedy this mischief, it was enacted,<sup>d</sup> "that all and every person and persons, who, by way of insurance or otherwise, should undertake or agree to deliver any goods, wares, or merchandises whatsoever, to be imported from parts beyond the seas, at any port or place whatsoever within this

Knowledge  
of under-  
writer.

<sup>a</sup> Le Guidon, c. 2, art. 2.

<sup>b</sup> Emerigon, Tr. des Ass. tom. i. c. 8, s. 5. I find no express notice of this in

the Code de Commerce.

<sup>c</sup> Molloy, lib. 2, c. 7, s. 15.

<sup>d</sup> 4 & 5 W. & M. c. 15.

Kingdom of England, dominion of Wales, or town of Berwick-CHAP. XIII.  
 on-Tweed, without paying the duties and customs that should be  
 le and payable for the same at such importation, *or any prohibited*  
*goods whatsoever*; or in pursuance of such insurance, undertaking,  
 agreement, should deliver, or cause or procure to be delivered,  
 any prohibited goods, or should deliver, or cause or procure to be  
 delivered any goods or merchandises whatsoever, without paying  
 such duties and customs as aforesaid, knowing thereof, and all and  
 every their aiders, abettors and assistants, should for every such  
 offence forfeit and lose the sum of 500*l.*, over and above all other  
 forfeitures and penalties, to which they are liable by any act already  
 in force."<sup>a</sup> It was also enacted, "that all and every person and  
 persons, who should agree to pay any sum or sums of money for  
 the insuring or conveying any goods or merchandises that should  
 be so imported, without paying the customs and duties due and  
 payable at the importation thereof, or of any prohibited goods what-  
 ever, or should receive or take such prohibited goods into his or  
 her house, or warehouse, or other place on land, or such other  
 place, before such customs or duties were paid, knowing thereof,  
 should also for every such offence forfeit and lose the like sum of  
 500*l.*; the one half of the said forfeitures to be to their majesties,  
 and the other half to the informer, or to such persons as should sue  
 for the same. And if the insurer, conveyor, or manager of such  
 goods should be the discoverer of the same, he should not only keep  
 the insurance money or reward given him, and be discharged of the  
 penalties to which he was liable by reason of such offence, but  
 should also have to his own use one half of the forfeitures hereby  
 imposed upon the party or parties making such insurance or agree-  
 ment, or receiving the goods as aforesaid; and in case no discovery  
 could be made by the insurer, conveyor, or manager as aforesaid,  
 and the party or parties insured or concerned in such agreement  
 could make discovery thereof, he should recover and receive back  
 such insurance money or premium as he had paid upon such in-  
 surance or agreement, and should have to his own use one moiety  
 of the forfeitures imposed upon such insurer, conveyor, or manager  
 as aforesaid, and should also be discharged of the forfeitures hereby  
 imposed upon him or them."

*Goods absolutely prohibited to be imported are*<sup>b</sup>—*Books* wherein the  
 copyright shall be first subsisting, first composed or written or printed,  
 in the United Kingdom, and printed or reprinted in any other country,  
 to which the proprietor of such copyright or his agent shall have  
 given to the Commissioners of Customs a notice in writing that such  
 copyright subsists, such notice also stating when such copyright  
 will expire. *Coin*, viz., false money or counterfeit sterling. *Coin*,  
 silver of the realm, or any money purporting to be such, not being  
 of the established standard in weight or fineness. *Extracts*, essences,  
 or other concentrations of coffee, chicory, tea, or tobacco, or any ad-  
 mixture of the same. *Gunpowder*, *ammunition*, *arms*, or utensils of  
 war, except from the United Kingdom, or any *British* possession, and  
 base or counterfeit coin, are also prohibited to be imported or brought

What goods  
 are prohi-  
 bited abso-  
 lutely.

<sup>a</sup> See 8 & 9 Wm. 3, c. 36, s. 2.

<sup>b</sup> 16 & 17 Viet. c. 107.

Park on Insurance. either by sea or inland carriage or navigation into the *British* possessions in *America* and the *Mauritius*. *Malt*. *Indecent or obscene prints*, paintings, books, cards, lithographic or other engravings, or any other indecent or obscene articles. *Snuff Work*. *Tobacco Stalks*, stripped from the leaf, whether manufactured or not. Tobacco stalk flour.

What prohibited *sub modo*.

*Goods prohibited to be imported, except in transit*, and subject to such regulations and restrictions as the Commissioners of the Treasury may direct, and duly reported as goods in transit accordingly, are, *Articles of foreign manufacture*, and any packages of such articles bearing any names, brands, or marks, being or purporting to be the names, brands, or marks of *manufacturers resident* in the U. K. *Clocks and Watches* of any metal impressed with any mark or stamp appearing to be or to represent any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the U. K. *Parts of articles*; viz., any distinct or separate part of any article not accompanied by the other part or all the other parts of such article, so as to be complete and perfect, if such article be subject to duty according to the value thereof.

*Goods prohibited to be imported, except subject to the restrictions on importation herein contained.*—*Infected cattle*, sheep, or other animals, and hides, skins, horns, hoofs, or any other part of cattle or other animals which Her Majesty may, by order in council, prohibit, in order to prevent any contagious distemper. *Silk*, manufactures of silk, being the manufactures of Europe, unless into the ports of London, Liverpool, Hull, Southampton, Leith, or Dublin, or ports appointed by the Commissioners of Customs, or into the ports of Dover or Folkestone direct from Calais or Boulogne, and unless in ships of fifty tons burden or upwards. *Spirits* (not being perfumed or medicinal spirits), unless in ships of fifty tons burden at least, and in casks or other vessels capable of containing liquids, each of such casks or other vessels being of the size or content of twenty gallons at the least, and duly reported, or in glass bottles or stone bottles not exceeding the size of three-pint bottles, and being really part of the cargo of the importing ship, and duly reported. *Tobacco and Snuff* from the East Indies, and Tobacco from the Turkish dominions, including Egypt, unless imported direct from any of those places in packages containing not less than one hundred pounds net weight each. Negrohead tobacco, and also snuff, being the produce of the United States of America, unless in hogsheads, casks, chests, or cases containing not less than two hundred pounds net weight each, or unless imported direct from the said United States in packages containing not less than one hundred and fifty pounds net weight each. Tobacco from Malta, and tobacco the produce of Porto Rico, Mexico, South America, St. Domingo, Cuba, the British possessions in America and the west coast of Africa, unless in hogsheads, casks, chests or cases containing not less than two hundred pounds net weight each, or unless imported direct from those places or from the United States of America in packages containing not less than eighty pounds net weight each. Tobacco and snuff the produce of the Philippine Islands, unless in hogsheads, casks, chests, or cases, con-

taining not less than two hundred pounds net weight each, or unless **CHAP. XIII.** such tobacco or snuff be imported from Manilla direct, in bales or packages containing not less than two hundred pounds net weight each. Tobacco and snuff of or from any other country or place not before enumerated, unless in hogsheads, casks, chests, or cases, containing not less than two hundred pounds net weight each. Cigars, unless in packages containing not less than one hundred pounds net weight each. Cigarillos or Cigarettos, unless in packages containing not less than seventy-five pounds net weight each. Tobacco, not being cigars, cigarillos or cigaretos, and snuff, separated or divided in any manner within any package in which the same may by the foregoing table be imported, except tobacco from the dominion of the Turkish empire, or from Egypt, in outer packages containing not less than one hundred pounds net weight each. Tobacco, snuff, cigars, cigarillos, or cigaretos, of any kind, or from any country or place whatever, whether herein-before enumerated as especially restricted, or not, unless in ships of not less than one hundred and twenty tons burden, and imported into such ports only as are or may be approved of by the Commissioners of Customs. And the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation, or order in council.

The question naturally occurs, what goods come under the description of prohibited goods, so as to render an insurance upon them void. The Customs Consolidation Act, 1853 (16 & 17 Vict., c. 107), gives the above list. Thus much may be laid down as a general proposition, that all insurances upon goods forbidden to be exported or imported by positive statutes or by proclamation or order in council, or which, from the nature of the commodity and by the laws of nations, must necessarily be contraband, are absolutely null and void. Under the first division may be ranked all offences against the *revenue* laws of this country; and therefore, if an insurance were made in order to protect smuggled goods, such insurance would doubtless be of no effect. To this head, also, may be referred any breach of the *navigation acts*, which were established for the protection, encouragement, and advancement of our commercial and naval interests.<sup>a</sup>

General rule as regards insurance.

We now come to consider those commodities, which, from their nature, as well as by the laws of nations, are contraband. Upon this occasion, Grotius and Bynkershoek are the best guides that can possibly be followed;<sup>b</sup> and from them we may collect that it is unlawful to carry anything to besieged cities or fortresses; a rule which they declare to have been established by common consent, and the usage of all nations. Grotius divides goods into three kinds:<sup>c</sup> such as can only be of use in time of war; and these are clearly contraband, such as arms and ammunition. 2ndly, Such as answer no purpose in war, and are merely intended for pleasure; and these may be lawfully conveyed to an enemy. But the third kind are of a mixed nature, such as money, provisions, ships, and the materials of ships;

Things contraband by international law.

<sup>a</sup> And see ss. 152, 163.

<sup>c</sup> Lib. 3, c. 1, s. 5.

<sup>b</sup> Grotius, lib. 3, c. 1; Bynk. lib. 1, c. 11.



*Part on In-*  
*surance.* in which case, before we can decide upon the propriety of exporting such commodities, the situation of the war between the contending parties is to be considered. Upon this point his reasoning is excellent: "If," says he, "I cannot defend myself without intercepting the commodities intended for my enemies, necessity will give me the right; but still I shall be liable to make restitution, unless some other cause of seizure appears. For if the conveyance of such commodities to the enemy shall prevent the execution of my plans, and he who carried them knew that I had besieged or blockaded the town, and that peace or a surrender was expected, he shall be answerable for the loss sustained by his misconduct."<sup>a</sup> With this opinion Bynkershoek for the most part coincides; because, as he observes, the siege alone is the cause why it is not lawful to carry anything to the besieged, whether it be contraband or not: for a besieged city is never compelled to surrender by force, but by famine, and the want of other necessities. If it were to be permitted to supply them with the things of which they stand in need, perhaps the assailants would be obliged to raise the siege. But as it is impossible to say of what things the besieged stand in need, or in what they abound, every species of commodity is forbidden to be carried into the garrison; for otherwise there would be no certain rule of settling disputes. This learned author, however, differs from Grotius, in that passage where he says, "the carrier of goods shall be answerable, if peace or a surrender was expected, and it was frustrated by such means." Bynkershoek is of opinion that such doctrine is neither consonant to reason, nor to the agreements entered into by the laws of nations. He reasons thus: "*Quæ ratio me arbitrum constituit de futurâ deditione aut pace? et si neutra expectetur, jam licet obsessis quælibet advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoquo modo deteriorem facere. Et qui advexit, non ultra tenebitur, quam de damno culpa dato? atqui in subditis id semper capitale fuit, quin et in amicis, edicto ante monitis, sæpe et in non monitis. Rursus, si quis nondum advexit, sed, dum advehere voluit deprehendatur, sola rerum interceptarum, retentione erimus contenti, idque donec caveatur, nihil tale in posterum commissum iri?*" He concludes thus: "I do not agree to that opinion, having learnt, from the custom and usages of all nations, to sell all intercepted goods, and often to inflict, if not a capital, at least a corporal punishment."<sup>b</sup> Such are the opinions of these two very learned writers, who, although in some respects they differ, agree in establishing this as a settled, undisputed rule, that whoever conveys any necessities to a besieged town, camp, or port, is guilty of a breach of the law of nations. This being the case, an insurance upon such commodities must necessarily be void and of no effect, agreeably to the principles which have already been advanced.

One question only remains to be considered; how far insurances upon goods, the exportation and importation of which are forbidden by the laws of *other* countries, are valid? In England the

<sup>a</sup> Lib. 1, c. 11.

<sup>b</sup> Grot. Bynk. loc. cit.

law is clear, as it has been laid down by two very great judges, that such insurances are good ; because the foundation of the contract is not illicit. It has been expressly held by Ld. Mansfield more than once, in which he has been confirmed by the whole Court of K. B.,<sup>a</sup> that one nation never takes notice of the revenue laws of another ; and therefore such an insurance was certainly good and valid. A similar opinion seems to have been entertained by Ld. Hardwicke ; at least so much may be collected from his argument in a case reported in Vezey.<sup>b</sup> But although this point is so clearly settled by the law of England, in which also the law of France coincides, it is certain that the expediency of it has been a question which has very much engaged the attention of some considerable French authors.<sup>c</sup> Their opinions can in no way affect the law of England, which stands upon much higher authority than the sentiments of speculative men, however respectable ; but it may be productive of some amusement, if not instruction, to see by what arguments the two different opinions are supported. Those who contend that such insurances are illegal, argue in this manner :<sup>d</sup> that they who carry on commerce in a country are obliged, by the custom of nations and natural law, to conform to the laws of that country where they trade. Every sovereign has power and jurisdiction over everything done in the country where he has a right to command ; he has consequently a right to make laws relative to commerce within his dominions, which bind all those who trade, as well strangers as subjects. No one can dispute with the sovereign the right he has to retain in his own country certain merchandises which are there to be found, and to prohibit the exportation of them. To export them contrary to his orders is to strike a blow at his undoubted authority ; and consequently it is unjust. But admitting, say they, that a Frenchman would not himself be subject to the law of Spain for the trade which he carries on in Spain, it cannot be denied that the Spaniards, whose assistance he requires, are subject to those laws ; and that they offend extremely in assisting him to export that the exportation of which is prohibited by law. This species of trade, then, is to be considered as illicit, and contrary to good faith ; and consequently the contract of insurance, introduced in order to protect it, by charging the insurer with the risk of confiscation, is illicit, and cannot induce any obligation. Those who support the opposite doctrine contend, that the exportation or importation of commodities prohibited by foreign laws is no offence ;<sup>e</sup> and that the means employed to effect it are regarded by the law as a laudable and ingenious exertion of skill. Thus the exportation of certain commodities is prohibited in Spain, which the government of that country has a right to do ; but the laws of his Catholic Majesty are not the rule of action for Frenchmen. It is allowed them to bring from Spain into France piastres, pistoles, and silks for the support

Against the  
revenue  
laws of  
other na-  
tions.

<sup>a</sup> Doug. 238.

<sup>b</sup> 1 Vezey, 319.

<sup>c</sup> 1 Emerigon, p. 210. I find no express notice of this in the *Code de*

*Commerce*.

<sup>d</sup> Pothier, Tr. d'Ass. c. 1, s. 2, art. 2, s. 8.

<sup>e</sup> 2 Val. Com. 129 ; 1 Emerigon, 218.

*Part in In-  
surance.*

of the banks, the manufactures, and the commerce of that country. These merchandises are a lawful branch of trade; and there is no reason why they should not be the subject-matter of a contract of insurance. But, above all, they insist that they are justified by the constant custom; and that the reasoners on the other side ought to be less strict, when it is considered that this contraband trade is a vice common to all commercial nations. The Spaniards and English in time of peace practise it in France; it is therefore permitted to carry it on in their respective countries by way of reprisal. Whatever difference there may be on the question of expediency, it is universally admitted by the French writers that insurances upon such goods are valid. We have already seen that the same ideas have been adopted by the law of England; and that every policy upon goods, the exportation and importation of which is *not prohibited by the municipal laws of this country, or by the general laws of nations*, is legal and binding upon the parties; and the underwriter must answer for every loss arising by means of any of the usual perils.

#### CHAPTER XIV.

##### WAGER-POLICIES.

Origin of

HAVING in the four preceding chapters stated the various cases in which the contract of insurance is void from its very commencement, on account of its repugnancy to those principles of justice, equity, and good faith which are the great foundation of all contracts between man and man, we proceed to treat of those policies which by the positive statute law of the country are declared to be absolutely null and void. Of these the largest class are wager-policies or policies, as they are called, *upon interest or no interest*. The nature of the contract of insurance, in its original state, was, that a specific voyage should be performed free from perils; and in case of accidents during such voyage, the insurer, in consideration of the premium he received, was to bear the merchant harmless. It followed from thence that the contract related to the safety of the voyage thus particularly described, in respect either of ship or cargo, and that the person insured could not recover beyond the amount of his real loss. In process of time, however, variations were made by express agreement from the first kind of policy, and in cases where the trader did not think it proper to disclose the nature of his interest, the insurer dispensed with the insured having any interest either in the ship or cargo. In this last kind of policy (of which we are now to treat), "*valued free from average*," and *interest or no interest*, it is manifest that the performance of the voyage or adventure in a reasonable time

and manner, and not the bare existence of the ship or cargo, is the CHAP. XIV. object of the insurance. Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from a supposed and ideal loss, must have been originally bad. Indeed, it has been declared from the bench, in the reign of Queen Anne, that such insurances were formerly bad; for it is said in that case, that in former times if one had no interest, though the policy was an interest or no interest, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject-matter, should profit by them.<sup>a</sup> The idea thus started is very much confirmed by what fell from the court in the case of *Depaiba v. Ludlow*;<sup>b</sup> for the court here observed that insurances upon interest or no interest were introduced since the revolution. Taking it for granted, then, that the law of England in this respect, previous to the revolution, was such as these cases suppose it to be, it was perfectly consonant to the laws of most of the commercial states and countries in Europe. For we find that by positive regulations of Middleburg, Genoa, Koningsburg, Rotterdam, and Stockholm, all insurances upon wagers, or as interest or no interest, are declared to be absolutely void and of no effect.<sup>c</sup> But though this mode of insuring thus gained a footing in England, yet, when introduced, the courts of justice looked upon these contracts with a jealous eye, and by their determinations showed the strong prejudices which they entertained against them. The courts of equity, in particular, manifested that their inclination would lead them as much as possible to suppress such a species of contract; nay, that they still considered them as void.<sup>d</sup>

There was one very remarkable difference between policies upon interest, and such as were not; namely, that in policies upon interest you recover for the loss actually sustained, whether it be total or partial; but upon a wager-policy you could never recover but for a total loss. All the doctrine which turns upon this distinction between interest and wager-policies was considered at much length by Lord Mansfield in the famous cause of *Goss v. Withers*,<sup>e</sup> to which we have had occasion more than once to refer.

It has already been observed, that the security given to the insured was very considerably increased by the erection of two Assurance Companies, which were incorporated by royal charter in the year 1720; for the legislature had taken care that those corporations should have sufficient funds to answer any demands that might be made upon them in the common course of business. But this additional security for the insured soon produced many dangerous and alarming consequences, which, if they had not been checked, would have proved very detrimental to the trade of this country; for, instead of confining the business of insurances to real risks, and considering them merely as an indemnity to the fair dealer against any

<sup>a</sup> *Assiavedo v. Cambridge*, 10 Mod. notes, art. 332.

<sup>b</sup> *Le Pypre v. Farr*, 2 Vern. 716;

<sup>c</sup> *Comyna*, Rep. 360.

*Goddart v. Garrett*, 2 Vern. 269.

<sup>d</sup> 2 Mag. 70, see *Codes Français An-*

<sup>e</sup> 2 Burr. 683.

*Park on Insurance.*

Suppressed  
by Parlia-  
ment.

loss which he might sustain in the course of a trading voyage, which, as we have seen, was the original design of them, that practice, which only prevailed since the revolution, of insuring ideal risks under the names of interest or no interest, or without further proof of interest than the policy, or without benefit of salvage to the underwriters, was increasing to an alarming degree, and by such rapid strides as to threaten the speedy annihilation of that lucrative and most beneficial branch of trade. All these various kinds of insurance just enumerated (and many others which the ingenuity of bad men found no difficulty in devising) having no reference whatever to actual trade or commerce, were very justly considered as mere gaming or wager policies; and therefore the legislature thought it necessary to give them an effectual check, and, by positive rules, to fix and ascertain what property or interest a merchant should be permitted to insure. The causes which co-operated to induce the legislative body to pass such an act are fully stated in the preamble of it.<sup>a</sup> It then enacts, "That no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to H. M. or any of his subjects, or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such insurance shall be null and void to all intents and purposes. Provided always, that assurance on private ships of war fitted out by any of H. M.'s subjects solely to cruise against his majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; anything herein contained to the contrary thereof in any wise notwithstanding. Provided also, that any merchandises or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner as if this act had not been made."<sup>b</sup> The 4th sect. relates to *re-insurances*, which will be the subject of the following chapter; and sect. 5 enacts, "that all and every sum and sums of money to be lent on *bottomry*, or at *respondentia*, upon any ship or ships belonging to any of H.M.'s subjects, bound to or from the East Indies, shall be lent only on the ship or on the merchandise or effects laden or to be laden, on board of such ship, and shall be so expressed in the condition of the said bond; and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have the right to make assurance on the money so lent; and no borrower of money on *bottomry* or *respondentia*, as aforesaid, shall recover more on any assurance than the value of his interest in the ship, or in the merchandises or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or in the merchandises or effects laden on board, doth not amount to the full sum or sums he hath borrowed, as aforesaid, such borrower shall be responsible to the lender for so much of the money

<sup>a</sup> 19 Geo. 2, c. 37.

<sup>b</sup> Sect. 3.

borrowed as he hath not laid out on the ship or merchandise laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandises be totally lost." Upon this last section, of which we shall treat more fully in the chapter on *Bottomry*, it may be sufficient in this place to observe that none but the lender shall have a right to make insurance on the money lent. It is also to be remarked that this regulation of insurance on *bottomry* or respondentia interest, extends only to E. I. ships; and therefore an insurance of a respondentia interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances; and it was declared by the whole court in the case of *Glover v. Black*, as stated in a former chapter, to be the established law and usage of merchants that respondentia and *bottomry* must be mentioned and specified in the policy of insurance.<sup>a</sup> By the 1st sect. of the act it is clear that at this day *all insurances made contrary to it are absolutely void and of no effect*, which, as has already been shown, was also the case by the ancient law of this country. It may now be material to consider, first, what cases have, by the construction put by the learned judges upon this statute been held not to fall within its description; and 2ndly, those which do, and in which the policies have consequently been holden to be void. It was formerly a matter of doubt whether the act was meant to extend to insurances of *foreign* property, and on *foreign* ships. The better opinion, however, was, that it did not; for it was clear that such insurances did not fall within the words of the statute, and from an attentive consideration of the preamble they do not seem to come under the description of the mischiefs against which it was the intention of the legislature to provide. But these doubts are entirely at an end by several decisions of the courts, and particularly by the case of *Thellusson v. Fletcher*,<sup>b</sup> in which it was expressly declared by the court (and the reason for it stated) that the act was not designed to extend to foreign ships. CHAP. XIV.  
Construc-  
tion of Act.

It was formerly thought that a valued policy was a wager-policy, like interest or no interest. But this idea is now exploded. If, indeed, it appeared, or could be made appear, that the interest proved was merely a cover to a wager, in order to evade the statute, there is no doubt such a policy would be void.<sup>c</sup> It would also be void by the 8th and 9th Vict., c. 109—118.

In *Da Costa v. Firth*,<sup>d</sup> it appeared that an insurance had been made upon any of the packet-boats that should sail from L. to F., or such other port in England as His Majesty should direct, for one year, from Oct., 1763, to Oct., 1764, upon any kinds of goods and merchandises whatsoever. And it was agreed that the goods and mer-

<sup>a</sup> 3 Burr. 1394.

<sup>b</sup> Doug. 301.

<sup>c</sup> *Lewis v. Rucker*, 2 Burr. 1167;

*Grant v. Parkinson*, 6 T. R. 483; *Kent*

*v. Bird*, Camp. 583; *Lowrie v. Bourdieu*, Dougl. 451.

<sup>d</sup> 4 Burr. 1966.

Park on Insurance.—chandises should be valued at the sum insured on such packet-boat, without farther proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. The insured had an interest in bullion on board the H. packet, being one of the king's packets between L. and F., and it was totally lost within the time mentioned in the policy. The court held that this was a policy of a peculiar sort, and was an exception out of the statute of 19 Geo. 2, c. 37. It is a mixed policy, partly a wager-policy, partly an open one; and it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insurer was intitled as for a total loss.

The owner of a ship, who has paid the whole of the *salvage* and has a claim against the owner of the goods for contribution, is entitled to a lien on the goods; and consequently has an insurable interest in respect of such lien. The owner of the ship has a lien upon the cargo for *general average*, and, as a consequence, an insurable interest.<sup>a</sup> A mortgagee of a ship has an insurable interest, commensurate in value with the amount of his debt.<sup>b</sup>

Instances  
of insurable  
interest.

It has been solemnly settled that, upon a joint capture by the army and navy, the officers and crews of the ships before condemnation have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war. On the other hand, where a master hypothecated the ship, but under such circumstances that it could not be enforced in the Court of Admiralty: held, that the merchant had no insurable interest in the ship.<sup>c</sup> So, when Messrs. H. and Co., being the owners of a ship trading to the coast of Africa, and which was expected to arrive at Liverpool with a cargo of palm oil, agreed *verbally* to sell to the plaintiffs 200 tons of it. The plaintiffs insured the oil, and their expected profits thereon. Held that, as the contract was a verbal one, and therefore could not be enforced, they had no insurable interests.<sup>d</sup> So, where A, in England, contracted with B, at Petersburg, to send him a cargo of deals. The deals were shipped, and A insured them. B stopped them *in transitu* at Elsinore, A having become insolvent. Held, that A, after such stoppage, had not an insurable interest.<sup>e</sup>

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear and requires no explanation.

The 3rd section, by which insurances upon any merchandises or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal may be effected in the manner practised before this act was passed, seems to be obscurely worded. The learned commentator upon the law of England observes, that the reason of this proviso is sufficiently obvious.<sup>f</sup> Notwithstanding this authority, in order to comprehend the meaning of the legislature, we must observe that the trade from Spain

<sup>a</sup> Briggs v. The Merchant Traders' Ass. 13 Q. B. 174.

<sup>b</sup> Irving Richardson, 2 B. & Ad. 193.

<sup>c</sup> Stainbank v. Fenning, 11 C. B. 51, affd. in error.

<sup>d</sup> Stockdale v. Dunlop, 6 M. & W. 224.

<sup>e</sup> Clay v. Harrison, 10 B. & C. 99.

<sup>f</sup> 2 Bl. Com. 460.

and Portugal to their respective colonies and establishments in CHAP. XIV. S. America, and the returns thereof, can only be carried on by their own subjects, and all other persons are prohibited from that trade by positive regulations of these respective states. The consequence of such a prohibition is, that all the goods and merchandises which the subjects of this and other countries export from Spain and Portugal must be in the names of Spanish subjects. So that it was absolutely necessary to make this exception (for no other proof but the policy itself can be brought); otherwise all insurances upon that branch of trade must have been entirely void. The words, however, seem to allow a greater latitude than was meant by the legislature in making such a provision; for by adverting merely to the words, insurances from any ports or places in Europe or America, belonging to Spain and Portugal, to England or other ports of Europe may be made, as if this act had never passed. Whereas, by attending to the prohibition of trade just mentioned to any but the subjects of Spain and Portugal, as the commerce between these colonies and the parent countries can only be carried on by subjects, it is evident that the legislature intended rather to have said that insurances on goods from ports belonging to Spain and Portugal in Europe to any ports in America belonging to those courts, and from such ports in America to such ports or places in Europe, shall be valid and effectual contracts, than to authorize insurances from the dominions of Spain and Portugal in Europe or America, to whatsoever place in the world the ship, in which these goods are to be carried, may happen to be destined. The words, however, certainly admit of that broad construction, for the place of destination is not ascertained. Upon this section of the act, it may be observed, that the equitable construction of such contracts of insurance as are protected by it seems to be, that they may be made without interest, notwithstanding the case of *Goddart v. Garrett*, before cited; since in such instances it is impossible for the person insured to bring any certain proof of interest on board.\*

Hitherto we have spoken merely of that part of this very salutary act, which requires that every person making such a contract should have an interest in that which is the object of the insurance. Another part of it still claims our attention, that which prohibits *re-assurances*. What a re-assurance is, in what cases it is prohibited, and when it is allowable, will form the subject of the following chapter.

\* *Ante*, p. 73.



## CHAPTER XV.

## RE-ASSURANCE: AND DOUBLE INSURANCE.

Foreign  
law.

RE-ASSURANCE, as understood by the law of England, may be said to be a contract, which the first insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called re-assurers. This species of contract has obtained a place in most of the commercial systems of the trading powers of Europe; and it is allowed by them at this day to be politic and legal. The learned Roccus has decided expressly in favour of it; and has recited many respectable authorities in support of his opinion.<sup>a</sup> "Assecurator, post factam assecurationem, potest se assecurari facere ab alio assecuratore, et iste secundus assecurator tenetur pro assecuratione factâ a primo, et ad solvendum omne totum, quod primus assecurator solverit, et ista secunda assecuratio valet." By the ancient law of France such assurances were reckoned valid.<sup>b</sup> The *Code de Commerce* (342) also acknowledges them. The author of the "Guidon" observes, that if it so happen that the insurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the risk, they are at liberty to re-insure; but still they cannot prevent the insured from making his demand upon them in case of loss, from having, by their signature, promised indemnity, they cannot, by any protestations to the contrary, discharge themselves from their responsibility, without the consent of the insured. Lewis the XVth, when, by the assistance of the famous Colbert, he promulgated those ordinances, which will be a lasting honour to the French nation, adopted the idea that prevailed when the "Guidon" was written: for, by an article in that celebrated code of laws, he expressly declared, "that it should be lawful to the insurers to make re-assurance with other men of those effects, which they had themselves previously insured."<sup>c</sup> It is not in France alone that this law prevails; for by the positive and express regulations and ordinances of Koningsberg, Hamburgh, and Bilboa, re-assurances are allowed to be effected, and consequently are lawful contracts.<sup>d</sup> By the passage cited from the "Guidon" it might be observed, that it was a distinguishing character of this species of contract, that, notwithstanding a re-insurance, the first contract subsists as at first, without change or amendment. The re-insurer is wholly unconnected with the original owner of the property insured; and as there was no obligation between them originally, so none is raised by the subsequent act of the first underwriter.<sup>e</sup> The risks of the insurer form the object of the re-insurance, which is a new independent contract, not at all concerning the insured; who conse-

<sup>a</sup> Roccus de Ass. Not. 12.<sup>d</sup> 2 Mag. 190, 233, 419.<sup>b</sup> Le Guidon, c. 2. art. 19.<sup>e</sup> Emerigon, p. 247.<sup>c</sup> Ord. Lewis 14, tit. Assur. art. 20.

quently can exercise no power or authority with respect to it.<sup>a</sup> Agree- CHAP. XV.  
 ably to the laws of those countries just referred to, and consistently English  
 with the opinions of those respectable writers, whose works we have law.  
 had such frequent occasion to mention, the law of England adopted  
 their regulations, and permitted the underwriters upon policies to  
 insure themselves against those risks for which they had inadvertently  
 engaged to indemnify the insured; or where, perhaps, they had  
 involved themselves to a greater amount than their ability would  
 enable them to discharge. Although such a contract seems per- Common  
 fectly fair and reasonable in itself, and might be productive of very law of Eng-  
 beneficial consequences to those concerned in this important branch land.  
 of trade; yet, like many other useful institutions, it was so much  
 abused, and turned to purposes so pernicious to a commercial nation,  
 and so destructive of those very benefits it was originally intended  
 to promote and encourage, that the legislature was at last obliged  
 to interpose, and by a positive law to cut off all opportunity of  
 practising those frauds in future, which were become thus glaring  
 and enormous. Accordingly, by the 4th sect. of that statute, which  
 formed the subject of the preceding chapter, 19 Geo. 2, c. 37, it  
 was enacted, "that it should not be lawful to make re-assurance,  
 unless the assurer should be insolvent, become a bankrupt, or die;  
 in either of which cases, such assurer, his executors, administrators,  
 or assigns, might make re-assurance, to the amount before by him  
 assured, provided it should be expressed in the policy to be a re-  
 assurance." From this act it is apparent, that all kinds of re-  
 assurance are not prohibited; but wherever such a contract tends  
 to the advancement of commerce, or to the real benefit of an indi-  
 vidual, in such a case it shall be permitted. Thus, in case of insol-  
 vency or bankruptcy, it is advantageous to the creditors in general, Stat. law.  
 as well as to the individual, that a re-assurance should be made:  
 for by these means the fund of the bankrupt's estate is not dimi-  
 nished in case of loss, and the insured has a better security for the  
 payment of the amount of his damage, or at least a proportion of it.<sup>b</sup>  
 If the insurer die, it is no less necessary and beneficial to his suc-  
 cessors, that there should be a re-assurance, than it was in the  
 former case of a bankruptcy: because it will provide assets to satisfy  
 the insured in case a loss should happen, and thus secure the estate  
 of the deceased for the benefit of his heirs. Indeed, in both cases,  
 the intention of the legislature seems to have been, to provide a fund  
 for the payment of that proportion, which in case of an insolvency,  
 the insured will have a right to demand, in common with the other  
 creditors; and for the payment of the whole, without prejudice to the  
 heir, even in cases where the ancestor, at the time of his death, was  
 in solvent circumstances. This act is worded in such express terms,  
 excluding every species of re-assurance, except in the three in-

<sup>a</sup> Pothier, tit. Ass. No. 96.

<sup>b</sup> Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend

out of the bankrupt's estate. This being found a great discouragement to trade, was altered, 19 Geo. 2, c. 32, s. 2; 12 & 13 Vict. c. 106, s. 174.

*Park on Insurance.* instances of death, bankruptcy, or insolvency, that a doubt, as it should seem, could hardly be founded upon it. But as it was held, that the first clause of the statute prohibiting insurances, interest or no interest, did not extend to foreign ships; so it was argued, that re-assurances made here on the ships of foreigners did not fall within the act. It might have occurred, however, that the first clause of the statute is qualified, and only prohibits such insurances when made on H.M. ships, or the ships belonging to H.M. subjects; whereas the clause in question is general and without restriction; the inference from which is, that the legislature had both objects in view, and meant wholly to prohibit the one, but not the other. This point came on to be considered by the Court of K.B. in 1787, in the form of a special case, stating, that a re-assurance was made by the defendant on a French vessel, first insured by a French underwriter at Marseilles, who was living, and who, at the time of subscribing the second policy, was solvent. The court (Ashurst, Buller, and Grose) were unanimously of opinion, that this policy of re-assurance was void: and that every re-assurance in this country, either by British subjects or foreigners, on British or foreign ships, is void by the statute: unless the first assurer be insolvent, become a bankrupt, or die.<sup>a</sup>

There is another species of re-assurance allowed by the laws of France, as established by an ordinance of Lewis the XIVth, which was also taken from that ancient and excellent French treatise that has been so frequently mentioned.<sup>b</sup> By this regulation, it is declared lawful for the assured to insure the solvency of the underwriter.<sup>c</sup> By these means, the person insured gets rid of those fears which he may have conceived concerning the ability of the insurers to pay, and he gains a second security to answer the sufficiency of the first. But it is not to France alone that this kind of contract is restrained; for by the positive laws of many other maritime states, such re-assurances are valid and binding contracts.<sup>d</sup> The English statute, which has been the subject of this and the preceding chapter, takes no express notice of this sort of insurance; because, in truth, I believe, it never was very much in practice in England; but, however, it seems clear that such a circumstance as the solvency of the underwriter is not an insurable interest; that a policy opened upon such an event would be treated as a wager-policy; and consequently fall within the statute of George II., which declares all policies made by way of gaming or wagering, to be absolutely null and void to all intents and purposes.

Double Insurance.

Having said thus much of re-assurances, I shall proceed to consider the nature of a double insurance, and to state the few cases that have been determined upon the subject. I treat of it in this place, because these two kinds of insurance have been sometimes confounded together, and supposed to mean the same thing; whereas no two ideas can be more distinct. We have already seen what is meant by a re-assurance. A double insurance is where the

<sup>a</sup> *Andre v. Fletcher*, 2 T. R. 161.

<sup>b</sup> *Le Guidon*, c. 2, art. 20. I find no express notice of this in the *Code de Com-*

*merce*, see art. 342.

<sup>c</sup> Ord. of Lewis 14, tit. Ass. art. 20.

<sup>d</sup> 2 Mag. 190, 419.

same man is to receive two sums instead of one, or the same sum CHAP. XV. twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship. The first distinction between these two contracts is, that a re-assurance is a contract made by the first underwriter, his executors or assigns, to secure himself or his estate: a double insurance is entered into by the insured. A re-assurance, except in the cases provided for by the statute, is absolutely void: a double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may recover his loss, against which of the underwriters he pleases, but he can recover for no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity, in case of loss; it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured; payment by one insurer operating as a satisfaction for the others.<sup>a</sup>

These principles have been fully declared to be law in several cases.<sup>b</sup>

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; *yet various persons may insure various interests on the same thing*, and each to the whole value (as the master for wages; the owner for freight; one person for goods, another for bottomry) and such a contract does not fall within the idea of a double insurance.<sup>c</sup>

In the course of what has been said upon double insurance, no notice has been taken of the laws of foreign states respecting that point: the reason of this silence is the great contrariety to be found in their laws upon the subject; it being almost impossible to mention two countries whose regulations, as to this matter, are similar.<sup>d</sup> In one the contract is absolutely void, and a forfeiture ensues: in others, if the first policy amount to the value of the effects laden, the other insurers shall withdraw their insurance, retaining one half per cent., and in some other countries, the double insurance is merely void without any forfeiture being incurred. But the law of England with respect to double insurance is so clear, and so well

<sup>a</sup> Morgan v. Price, 4 Exch. 615; as to return of premium, see Fisk v. Maaserman, 8 M. & W. 165.

<sup>b</sup> Newby v. Reed, 1 Black. Rep. 416; Rogers v. Davis and Davis v. Gildard, cited in Morgan v. Price. Bonsfield

v. Barnea, 4 Camp. 228.

<sup>c</sup> Godin v. The L. Ass. Co. 1 Burr. 489.

<sup>d</sup> See 2 Mag. p. 77; Code de Commerce, Tit. Ass. 172, 267.

Part on Insurance. founded in reason and natural justice, as to require no illustration or confirmation from the laws of any other country.

Having in this and the five preceding chapters, treated of those circumstances, by which the contract of insurance is rendered void from its commencement, on account of some radical defect, which prevents the policy from ever having any operation at all; and having, in the course of that inquiry, been led into a variety of discussion, involving in it a very material part of the law of insurance: we shall proceed to show in what cases the policy, although not void *ab initio*, is rendered of no effect, because the insured has not himself fully complied with those conditions, which he has either expressly or tacitly, from the nature of his contract, undertaken to perform. It was indeed observed in the first chapter of this work, that although the policy is not subscribed by the insured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwise it is a dead letter, and he can never recover an indemnity for any loss which he may happen to sustain.

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## CHAPTER XVI.

### CHANGING THE SHIP.

Of those causes, which will operate as a bar to the insured's recovering upon a policy of insurance against the underwriter, the first to be mentioned is that of changing the ship; or, as it has commonly been called, changing the bottom. This will require but very little discussion. We formerly said, that except in some special cases of insurances upon ship or ships, it was essentially requisite to render a policy of insurance effectual, that the name of the ship, on which the risk was to be run, should be inserted. That being done, it follows as an implied condition that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all; nor during the course of the voyage remove the property insured to another ship, *without the consent of the underwriter, or without being impelled by a case of unavoidable necessity*. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods on board a particular ship, or upon the ship itself; and it becomes a material consideration in a contract of insurance upon what vessel the risk is to be run, since the one may be much stronger and more able to resist the perils of the sea; or, by its swift sailing, much better able to escape from the pursuit of an

enemy than the other.<sup>a</sup> Malyne, it is true, in his "*Lex Mercatoria*," appears to be of a different opinion,<sup>b</sup> for he says, "It sometimes happens, that upon some special consideration this clause forbidding the transferring of goods from one ship to another is inserted in policies of assurance, because, in time of hostility or war between princes, it might be unladen in such ships of those contending princes, by which the adventure would be encreased. But, according to the usual insurances which are made generally without an exception, the assurer is liable thereunto; for it is understood that the master of a ship, without some good and accidental cause, would not put the goods from one ship to another, but would deliver them, according to the charter-party, at the appointed place." The reason given by Malyne, in support of his position, is by no means satisfactory, nor is it well founded in point of experience; neither has he adduced a single authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way, at least, as far as I have been able to trace it. Molloy has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and master, by consent, become freighters of another vessel for the safe delivery of the goods, and then after she is loaded, the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: "If these words be inserted, namely, the goods laden to be transported and delivered at such place by the said ship, or by any other ship or vessel, until they be safely landed, the insurers must answer the misfortune."<sup>c</sup> But this does not at all affect the general rule before laid down, for it only goes to show that which is not denied, that the parties may take a case out of the general rule of law by a special agreement; and the exception proves the truth of the first proposition. Besides, in such a case, it should seem that the ship in which the goods are laden ought not to be changed, *but upon necessity*.<sup>d</sup> This opinion is confirmed by foreign writers. "*Merces si eadem navigatione transferantur de una navi in aliam, et si novissima navis, ubi merces transfusæ fuerunt, deperdatur, tunc est inspicienda forma assecurationis, in qua ei fuit dictum, quod assecurentur merces, quæ sunt in tali navi, tunc assecurator non tenetur, eo quod mentionem fecit in assecuratione de tali navi. Et ratio est, quia non par est ratio assecurationis, quando merces devehuntur in una navi, et quando in altera; imo solet id principaliter considerari inter ipsos assecuratōres, cum una navis sit magis fortis quam alia.*"<sup>e</sup> Roccus is corroborated by several learned writers upon this branch of jurisprudence.<sup>f</sup>

The general doctrine relative to changing the bottom of the ship was alluded to by Ld. Mansfield, when delivering the opinion of the court in the case of *Pelly v. Rl. Exch. Ass. Co.*<sup>g</sup> "One objec-

<sup>a</sup> See *Bold v. Rotheram*, 8 Q. B. 806.

<sup>b</sup> P. 118.

<sup>c</sup> Molloy, l. 2. c. 7, s. 11.

<sup>d</sup> Roccus de Ass. Not. 28.

<sup>e</sup> Santer. de Ass. p. 3, n. 35; Stracca glos. 8, n. 10.

<sup>f</sup> *Dick v. Barrell*, 2 Stra. 1248.

<sup>g</sup> 1 Burr. 351.

Park on Insurance. tion," said his Lordship, "was formed by comparing this case to that of changing the ship, or bottom, on board of which goods are insured, which the insured have no right to do.\* For there the identical ship is essential; that is the thing insured. But that case is not like the present." From this passage it is evident that *Ld. Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an insurance is made on a specific ship, and the insured, *not being impelled by any necessity*, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract and cannot recover against the underwriter.

## CHAPTER XVII.

DEVIATION.<sup>b</sup>

**Meaning of.** **DEVIATION**, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined, and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue, without unreasonable delay,<sup>c</sup> the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done, if there be no special agreement to allow the ship to go to certain places out of the *usual* track; or if there be no just cause assigned for such a deviation,<sup>d</sup> as to space or time, it is but just and reasonable that the underwriter should no longer be bound by his contract, the insurer having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that against which the insurer has undertaken to indemnify,<sup>e</sup> (which is the true objection to a deviation) the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a

**Policy of the law.**

\* This is to be taken as a rule, *subject to the exception of inevitable or urgent necessity*: for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the 2nd ship, if they act from necessity, and for the benefit of all

concerned. See *Plantamour v. Staples*, 1 T. R. 611, note a; *Shipton v. Thornton*, 9 A. & E. 322; *Bold v. Rotherham*, 8 Q. B. 806.

<sup>b</sup> See *Goram v. Sweeting*, 2 Wms. Saund. 200.

<sup>c</sup> See *Phillips v. Irving*, 8 Sc. N. C. 8.

<sup>d</sup> *Roccus Not.* 52.

<sup>e</sup> *Doug. Rep.* 278.

larger premium. *Nor is it at all material, whether the loss be or be not an actual consequence of the deviation*, for the insurers are in no case answerable for a subsequent loss, in whatever place it happen or to whatever cause it may be attributed. *Neither does it make any difference whether the insured was or was not consenting to the deviation.*<sup>a</sup> Ca. XVII.

It seemed to be the opinion of *Ld. Mansfield*, and a special jury, and was sworn to be the usage by several witnesses, that if a merchant ship carry letters of marque, she may chase an enemy, though she may not cruise, without being deemed guilty of a deviation. On an insurance of the *Mary* at and from London to Cork and the West Indies, the question was whether a ship, having letters of marque, could chase an enemy's ship without being said to have deviated. The facts were, that in the night the *Mary* had descried a Spanish sail, and after chasing lost sight of her for six hours till the morning, when they engaged. The *Mary* did not make a prize of the Spanish sail, but she proceeded on her voyage and was afterwards captured. It was agreed on all hands that a ship, in such circumstances, might not cruise; and several witnesses spoke to the usage and practice of ships which carried letters of marque chasing an enemy. It was admitted on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended that if the letter of marque lost sight of the enemy that it was no longer chasing but cruising. *Ld. Mansfield* left it upon the evidence to the jury, who found for the plaintiffs, thereby deciding the question in the affirmative.<sup>b</sup> Chasing an enemy.

It may be collected from numerous cases that delay before or after the commencement of the voyage insured is not equivalent to a deviation, *unless it be unreasonable*. Whether the time is unreasonable or not must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be.<sup>c</sup> So on a trading voyage the trade must be carried on with usual and reasonable expedition.<sup>d</sup> When a voyage is described to specified ports, especially when such is the regular course of the voyage, as a general rule, the ship must go to the places mentioned in the policy in the order in which they are named (if she go to more than one), otherwise it is a deviation.<sup>e</sup> Delay.

There is no implied condition in a policy, whether it be on ship and freight, or on goods, that the ship shall not trade in the course of her voyage. Consequently, if she can do so, without deviation or delay, that is, without increasing or varying the risk, the underwriters are not discharged.<sup>f</sup> When liberty is given by the policy to touch, stay, and trade at any ports or places whatsoever, it is confined to a staying or trading at any port or place for a purpose Trading.

<sup>a</sup> *Fox v. Black, Townson v. Guyon*, and *Cock v. Townson*, 2 Park, 438, 7th Edit.; *Elliott v. Wilson*, 7 Brown's P. C. 459.

<sup>b</sup> *Jolly v. Walker*, at Guildhall, East, Vac. 1781.

<sup>c</sup> *Phillips v. Irving*, 8 Scott, N. R. 1.

<sup>d</sup> *Hartley, v. Buggin*, 2 Park Ins. 468.

<sup>e</sup> *Beatson v. Haworth*, 6 T. R. 531; *Marsden v. Reid*, 3 East, 572; *Ashley v. Pratt*, 16 M. & W. 476.

<sup>f</sup> *Raine v. Bell*, 9 East, 195; *Laroche v. Oswin*, 12 Ib. 133.



*Park on Insurance.* subordinate to the voyage insured, which is the principal object of the policy.<sup>a</sup>

*Causes that justify a deviation.* But though the consequences of a voluntary deviation are thus fatal to the validity of the contract of insurance, *yet wherever the deviation, in space or time, arises from necessity, force, or any just cause, the underwriter still remains liable.*<sup>b</sup> The general writers upon this subject have enumerated the various circumstances, which will operate as a justification to the insured for leaving the direct track of the voyage, upon the ground of necessity and reasonable cause, such as to repair his vessel, to escape from an impending storm, or to avoid an enemy.<sup>c</sup> In our reports of decisions in the English courts of justice, we find instances of all these various excuses being allowed as sufficient to justify a deviation; and also another species of excuse, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I shall rank all the cases which apply to this branch of our enquiry under these several divisions.

*To repair.* The first ground of necessity which justifies a deviation, is that of going into port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation, because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in proper condition, capable of performing the voyage.<sup>d</sup>

*Stress of weather.* The next excuse for leaving the direct course is *stress of weather*. Upon this point the rule is this, that wherever a ship, in order to escape a storm, goes out of the direct course; or when, in the due course of the voyage, is driven out of it by stress of weather, this is no deviation, because it was occasioned by the act of God, which, by a maxim of law, is said to work an injury to no man. It has also been held, that if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven.<sup>e</sup> A deviation may also be justified, if done to *avoid an enemy*, or *seek for convoy*, because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.<sup>f</sup>

*Usage of trade.* In our law books we sometimes meet with cases which say that a deviation may be *justified by the usage and custom of the trade*. But that is not quite correct, for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from A to B, it is not a deviation to stop there, because it is a part of the voyage. There is no deception upon the insurer, because he is bound to take notice of the usages of trade; they are notorious to all the world, and when the usage has declared it lawful in a specific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance

<sup>a</sup> Bottomley v. Bovill, 5 B. & C. 219.

Atk. 545.

<sup>b</sup> Roccus, n. 52.

<sup>c</sup> Harrington v. Halkeld, Park on

<sup>c</sup> Roccus, 52; Santer de Ass. p. 3, n. 52.

Ins. 445 (7th Edit.)

<sup>f</sup> See D'Aquilar v. Tobin, Holt. N.

<sup>d</sup> Motteux v. The Lon. Ass. Co. 1

P. C. 125.

between the parties, as if it had been particularly mentioned. But CH. XVII. in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject. If the usage be general, although there should be exceptions, that will suffice.<sup>a</sup>

Having thus mentioned many cases to be found in the books of reports, which operate as an excuse for a departure from the due course of the voyage, and which prevent those effects which always follow a deviation, namely, the discharge of the insurer from his contract; it will be proper to observe that it is not meant to impute that other circumstances may not frequently happen, which will have precisely the same consequences. For wherever a ship loses that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and consequently as much protected by it, as if expressed in terms.<sup>b</sup> and therefore, in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, and consequences of the act, as the true criterion of judgment. If any of the circumstances above stated do really and *bond fide* occur so as to render a deviation absolutely necessary, the ship must pursue such voyage of necessity in the direct course and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage superadded by necessity ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.<sup>c</sup> Again, whenever the excuse of necessity is set up, it must satisfactorily appear that every proper precaution was taken by the assured, and that there was no default on his part.<sup>d</sup>

But though an actual deviation from the voyage insured is thus A deviation fatal to the contract of insurance; yet a deviation merely intended, only intended. but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus, in the case of an insurance from Carolina to Lisbon, and at and from thence to Bristol, it appeared that the captain had taken in salt, which he was to deliver at Falmouth before he went to Bristol; but the ship was taken in the direct road to both, and before she came to the point, where she would have turned off to Falmouth. It was held that the insurer was liable, for it is but an intention to deviate, and that was held not sufficient to discharge the underwriter.<sup>e</sup> In the case of *Carter v. the R. Exch. Ass. Co.*, where the insurance was from Honduras to London, and a consignment to Amsterdam, a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.<sup>f</sup> The doctrine laid down in these cases has since been fr

<sup>a</sup> Vallance v. Dewar, 1 Camp. 503.

<sup>b</sup> Bond v. Nutt, Cowp. 601.

<sup>c</sup> Lavabre v. Walter, Dougl. 271.

<sup>d</sup> Woolf v. Claggett, 3 Esp. 257.

<sup>e</sup> Foster v. Wilmer, 2 Stra. 1249.

<sup>f</sup> *Ib.*

Park on Insurance.

quently recognized in subsequent decisions, and particularly by Ld. Mansfield in the case of *Thelluson v. Ferguson*.<sup>a</sup> The insurance was from Guadaloupe to Havre, and by the depositions it appeared that the ship sailed for Havre, and was always intended for Havre, but was directed to keep in the course of Brest for safety. One of the grounds of defence was, that the ship never sailed from G. to H. but on a voyage from G. to B. : Ld. Mansfield, in answer said, "the voyage to B. was, at most, but an intended deviation, not carried into effect." If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to sail upon the voyage insured ; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the court of K. B. in the case of *Wooldridge v. Boydell*, and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.<sup>b</sup>

If a ship be insured from a day certain from A. to B. and before the day sail on a different voyage from that insured, the assured cannot recover, even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.<sup>c</sup> From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation will fall upon the underwriters. Thus it was held by Ld. Ch. J. Holt,<sup>d</sup> who said that if a policy of insurance be made to begin from the departure of the ship from England until, &c., and after the departure a damage happens, &c., and then the ship deviates ; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation the insurers shall make satisfaction to the insured.

Fact for the jury.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.<sup>e</sup>

Premium.

In cases of deviation, the premium is not to be returned ; because the risk being commenced, the underwriter is entitled to retain it : but of this more will be said in a subsequent chapter.

<sup>a</sup> Dougl. 346.

<sup>b</sup> Dougl. 10.

<sup>c</sup> Way v. Modigliani, 2 T. R. 30.

<sup>d</sup> Green v. Young, 2 Ld. Raym. 840;

and see Way v. Moligiani, 2 T. R. 30; Middlewood v. Blakes, 7 Ib. 162.

<sup>e</sup> See Dougl. 758; Anon. Lofft. 421; Langham v. Allnutt. 4 Taunt. 511.

## CHAPTER XVIII.

## CH. XVIII.

## NON-COMPLIANCE WITH WARRANTIES.

In the two preceding chapters we have seen the effect which the non-observance of implied conditions has upon the contract of insurance; we shall now proceed to consider the nature of warranties; their various kinds; and how far they must be complied with on the part of the insured, in order to render the contract binding between the parties. A warranty in a policy of insurance is a *condition*,<sup>What.</sup> or a contingency, that a certain thing shall be done, or happen, and unless that is performed, the warrantor has no right of action on the policy.<sup>a</sup> It is perfectly immaterial for what view the warranty is introduced, or whether the party had any view at all; but being once inserted, it becomes a binding condition on the insured: and unless he can show that he has literally fulfilled it, or that it was performed, the contract is the same as if it had never existed. We have already seen that the breach of an *implied condition* is sufficient to avoid the policy; *à fortiori*, therefore, the effect must be the same where the *condition is express*, and not liable to misrepresentation or error, because it makes a part of the written contract. To say that the underwriter should answer for a loss, notwithstanding the other party has failed in his engagements, would be to make a different rule, in this species of contract, from that which subsists in every other; although this, of all other contracts depends most upon the strictest attention to the purest rules of equity and good faith. Indeed the obligation to a strict performance of all promises and conditions in every species of contract may be deduced, as has been truly observed by an elegant moral writer, from the necessity of such a conduct to the well-being or the existence of human society.<sup>b</sup> We have said that a warranty must be strictly and literally performed; and therefore whether the thing, warranted to be done, be or be not essential to the security of the ship; or whether the loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy: because he himself has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himself by such a condition. And though the condition broken be not, perhaps, a material one, yet the justice of the law is evident from this consideration, that it is absolutely necessary to have one rule of decision; and that it is much better to say, that warranties shall in all cases be strictly complied with, than to leave it in the breast of a judge or jury to say, that, in one case it shall, and in another it shall not. The very meaning of a warranty is to preclude all inquiries into the materiality or the substantial performance of it:<sup>c</sup> and, although,

<sup>a</sup> De Hahn v. Hartley, 1, T. R. 343;  
Glaholm v. Hays, 2 Scott, N. C.  
482; Ollive v. Booker, 1 Exch. 423; and  
see Elliott v. Von Glehn, 13 Q. B. 632.

<sup>b</sup> Paley's Mor. Phil.

<sup>c</sup> Goram v. Sweeting, 2 Wms. Saund.  
201 a.

*Park on Insurance.*

sometimes partial inconveniences may arise from such a rule, yet, upon the whole, it will certainly produce public salutary effects. The insured is bound not to draw the underwriter into error, by false declarations respecting those things about which the contract is made. *Debet præstare rem ita esse ut affirmavit.*<sup>a</sup> Whether the words used amount to a warranty, or to a representation only, depends in each case upon the intention of the parties, to be collected from the terms of the agreement itself, and from the subject-matter to which it relates.<sup>b</sup> But as a warranty must be strictly complied with in favour of the underwriter, and against the insured, equal justice demands, and the true meaning of the contract of insurance requires, that if a strict and literal compliance with the warranty will support the demand of the insured, the decision ought to be in his favour, especially when by such a decision all the words in the policy will have their full operation. In an action on a policy on goods, dated 9th Dec., 1784, lost or not lost, warranted well this 9th day of Dec., 1784: it appeared that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th of Dec.; that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning.<sup>d</sup> Upon a motion to set aside a nonsuit which had been entered, *Ld. Kenyon, Ch. Just., Ashhurst, Buller, and Grose, Just.,* were clearly of opinion that the warranty was sufficiently complied with, if the ship were well at any time that day; that the nature of a warranty goes to determine the question; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet must be literally complied with; still if it be complied with, that is enough that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on goods from the lading: and thus, too, the words lost or not lost have also their operation.

Cause of non-compliance.

This being the case, it follows, as a necessary consequence, that it is very immaterial to what cause the non-compliance is to be attributed; for if the fact be, that the warranty was not complied with, though perhaps for the best reasons, the policy has no effect. The contingency has not happened; and therefore the party interested has a right to say, that there is no contract between them. Upon this account it is, that if a ship be warranted to sail on or before the 1st of Aug., and she be prevented by any accident from sailing till the 2nd of Aug., as by the sudden want of any necessary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to sail; but there would be an end of the policy.

<sup>a</sup> *Goram v. Sweeting*, 2 Wms. Saund. 201; *Pothier, Tr. du Contrat d'Ass.* p. 197.

<sup>b</sup> *Glaholm v. Hays*, 2 Sc. N. C. 482;

*Ollive v. Booker*, 1 Exch. 423.

<sup>c</sup> *Blackburn v. Cockill*, 8 Term. R. 360.

In this strict and literal compliance with the terms of the warranty consists the difference between a warranty and a representation.<sup>a</sup> Of this distinction something was said in a preceding chapter:<sup>b</sup> it is sufficient now to observe, that a warranty, as part of the agreement and a condition on which it was made, must be strictly complied with; whereas a representation need only be performed in substance. In a warranty, the person making it takes the risk of its truth or falsehood upon himself; in a representation, if the insured assert that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud. But a representation, made without fraud, if not false in a material point, or if it be substantially, though not literally fulfilled, does not vitiate the policy.<sup>c</sup> But as representations were very often made in writing, by way of instructions for effecting a policy, it became necessary to specify what written declarations should be deemed warranties, and what representations. It was therefore, by several decisions of the courts, held to be law, that in order to make written instructions valid and binding as a warranty, *they must appear on the face of the instrument itself*, by which the contract of insurance is effected.<sup>d</sup> Even though a written paper be wrapt up in the policy, when it is brought to the underwriters to subscribe, and shown to them at that time; or even though it be wafered to the policy at the time of subscribing, still it is not in either case a warranty, or to be considered as part of the policy itself, but only as a representation.<sup>e</sup> A warranty, written in the margin of the policy, is equally binding, and subject to the same strict rule of construction, as if inserted in the body of the policy itself.<sup>f</sup>

Having stated those rules which apply to warranties in general, it will now be proper to consider the several kinds of warranties, and those principles which are peculiar to each species, confirmed by decisions of the courts. It would be endless to enumerate the various warranties that are to be found in policies; because they must frequently, and for the most part do, depend upon the particular circumstances of each case; such as the number of men, of guns, being copper sheathed, &c. But those which most frequently occur in our books of reports, and upon which the greatest questions have arisen, may be reduced to three classes: warranty as to the time of sailing; warranty as to convoy; and warranty of neutrality. Of each of these we shall treat; observing, in the first place, that those rules which are applicable to warranty in general, must necessarily also apply to each of these individually.

1st. *As to the time of sailing.* In most voyages the time at which they are to commence is a material circumstance; because in every

<sup>a</sup> 2 Wms. Saund. 201.

<sup>b</sup> *Ante*, p. 56.

<sup>c</sup> *Ib.*; Pawson v. Watson, Cowp. 785.

<sup>d</sup> *Ib.* Cowp. 790.

<sup>e</sup> Pawson v. Barnevelt, Dougl. p. 12,

n.; Bize v. Fletcher, *Ib.*

<sup>f</sup> Bean v. Stupart, Dougl. 10; Kenyon v. Berthon, Dougl. p. 12, n. (4); De Hahn v. Hartley, 1 T. R. 343.

Park on Insurance.

country there are some seasons when navigation is much more dangerous than at others, owing to periodical winds, monsoons, and various other causes. Indeed, we have seen that a man having once warranted to sail on a particular day, whether the risk may be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer answerable. But this strict adherence to the very day specified must have arisen from the principle just stated; for if a latitude of one day were given, why not extend it further? It has, therefore, been held that when a ship has been warranted to sail on a particular day, though the ship be delayed for the best and wisest reasons, or even though she be detained by force, the warranty has not been complied with, and the insurer is discharged from his contract.<sup>a</sup>

But the necessity of a punctual adherence to the day on which the ship is warranted to sail by the policy is not peculiar to the law of England; for we find that foreign writers declare that the same rule is universally adopted.<sup>b</sup> If, say they, the owner of the ship or goods has said in the policy that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous, and on this account the insurer is more easily induced to underwrite the policy, and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time must, if he sail at a subsequent period, do it entirely at his own risk. If the warranty be to sail after a specific day, and the ship sail before, the policy is equally avoided as in the former case, because the terms of the warranty are as much departed from in the one case as in the other. On the 8th Dec., 1777, a policy was underwritten by the defendant on goods in a French ship, *Le Comte de Trebon*, "at and from Martinico to Havre de Grace, with liberty to touch at Guadaloupe; warranted to sail after the 12th of Jan., and on or before the 1st of Aug., 1778."<sup>c</sup> The insurance was made by the plaintiff on account of J. and Co., of Havre de Grace, owners of the ship and cargo, at which time it was not known whether she would load at Martinico or Guadaloupe, they having goods at both places; the policy was therefore intended to cover the risk from both or either of them. The ship having finished her outward voyage at M., sailed from thence on the 6th of Nov., 1777, for G., where she took in her whole loading without returning to M., which the captain intended to do, had he not got a complete cargo at G., from whence she sailed on the 26th of June, 1778, and was taken on the 3rd of Sept. The plaintiff demanded payment of the loss from the underwriters, which being refused he brought actions against them for the recovery thereof. This cause came on to be tried at Guildhall, before Mr. Just. Buller, when the defendant's objections were that, accord-

<sup>a</sup> *Hore v. Whitmore*, Cowp. 784; *Glaholm v. Hays*, 2 Scott, N. C. 471; *Ollive v. Booker*, 1 Exch. 423; *Colledge v. Hartz*, 6 Ib. 211.

<sup>b</sup> *Roccus*, Not. 38.

<sup>c</sup> *Vezian v. Grant*, before Buller J. Guildhall, East. Vac. 1779.

ing to the words of the policy, the voyage was to commence from M., CH. XVIII. and not from G., and that the warranty of the time of sailing was not complied with, the ship having sailed from M. before the 12th of Jan., 1778, to wit, on the 6th of Nov., 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant. But when a ship is warranted to sail on or before a particular day, if she sail from her port of loading with all her cargo and clearances on board, to the usual place of rendezvous at another part of the same island, *merely for the sake of joining convoy*, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day.<sup>a</sup>

A warranty to sail, without the word *from*, is not complied with by the vessel's raising her anchor, getting under sail, and moving onwards, unless, at the time of the performance of these acts, she has everything ready for the performance of the voyage, and such acts are done as the commencement of it, nothing remaining to be done afterwards.<sup>b</sup> So a warranty to *depart* before a certain day does not mean merely to break ground, but fairly to set out on the voyage. Therefore, when a ship in complete sea-readiness weighed anchor, with some little prospect of unfavourable weather, but in half an hour was beaten back, and came to anchor within the bar, half a mile nearer to the sea than the place of landing; held, not a departure within the meaning of the warranty.<sup>c</sup> In insurances at and from London, warranted to depart on or before a particular day, it has long been a question what shall be a departure from the port of London; or, rather, what is the port of London? and it is singular that this point has never been judicially determined. On the one hand, it is said that the moment a ship is cleared out at the Custom House and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side, it is contended, and with great appearance of reason, that a ship is not ready for sea till she has got her Custom House cocket on board, which is the final clearance, and which she cannot have till she arrive at Gravesend; that till this cocket is received, the ship dare not proceed to sea under a penalty, and till then is not entitled to the drawbacks, and that Gravesend is always considered as the limits of the Port of London, and unless the ship sail from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited. In a N. P. case, the R. Exch. Ass. Co. resisted a demand made upon them, in order to try this great question; but as it appeared from the evidence of the log-book that the ship did not, in truth, break ground till after the day named in the warranty, the

<sup>a</sup> Bond v. Nutt, Cowp. 608; Thelluson v. Ferguson, Doug. 346; Thelluson v. Stapley, 2 Park Ins. 7th Edit. 494; Earle v. Harris, 1b.

<sup>b</sup> Ridsdale v. Newnham, 3 M. & S.

456; Lang v. Anderdon, 3 B. & C. 499; Pettigrew v. Pringle, 3 B. & Ad. 520; Graham v. Barras, 5 Ib. 1016.

<sup>c</sup> Moir v. R. E. Ass. Co. 6 Taunt. 240; Colledge v. Hartz, 6 Exch. 209.



*Park on Insurance.* plaintiff was nonsuited, and the question remains undecided.<sup>a</sup> But the C. B. held in *Williams v. Marshall* that a ship did not export from the Port of *London*, on clearing at the Custom House in London, nor until she cleared at Gravesend.<sup>b</sup>

*Convoy.* The second species of warranty, which most frequently occurs in insurances, is that of sailing under the protection of *convoy*,<sup>c</sup> that is, certain ships of force appointed by Government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination. When the nature of a convoy is considered, it is highly reasonable that the policy should be forfeited, if the insured fail to comply with so material a condition, because the risk, which the underwriter takes upon himself, is very considerably increased, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the insured warrant that the vessel shall depart with convoy, and it do not, the policy is defeated, and the underwriter is not responsible.<sup>d</sup> We have already seen that every warranty must be strictly and literally complied with, and that a liberal and substantial performance merely will not be sufficient. Hence, in a warranty to sail with convoy, it becomes material to consider what shall be deemed a convoy within such a condition. Upon this point it has been solemnly settled by the Court of K. B., Mr. J. Willes excepted, who differed from the other learned judges upon that occasion, that it is not every single man of war which chooses to take a merchant ship under its protection, that will constitute such a convoy as a warranty means; but it must be a naval force under the command of a person appointed by the government of the country to which they belong. The reason of such a decision is wise, because Government must be supposed to be better informed of the designs and strength of the enemy, and what degree of force will be sufficient to repel their attempts. In the case in which these points were settled, it also became a question how far sailing orders from the commander-in-chief to the particular ship, or ships, were requisite to the constitution of a convoy. But it was not thought necessary to decide that point, although it seemed to be the opinion of the majority of the judges that they were not absolutely essential.<sup>e</sup>

*Foreign jurists.*

Although the decisions of the Court of K. B. require no additional authority to support them, yet it will be proper, merely by way of illustration, to point out to the reader in what cases the opinions of foreign writers agree with the determinations of the English courts of justice. M. D'Emerigon, a very distinguished French writer upon this branch of jurisprudence, puts this case:<sup>f</sup>—"On avoit fait des assurances sur un navire, de sortie de Marseille jusqu' aux Détroits de Gibraltar, et dans la police il étoit dit que le navire partiroit de Marseille sous l'escorte d'un bâtiment de roi; autre-

<sup>a</sup> *Rogers v. R. Exch. Ass. Co. Sit. in C.P. after Mich. 1787, before Ld. Loughborough.*

<sup>b</sup> 2 Marsh. 92.

<sup>c</sup> *Postl. Dict. tit. Convoy.*

<sup>d</sup> 1 Emerigon, *Traité des Ass.* 164.

<sup>e</sup> *Hibbert v. Pigou, Park Ina.* 498, 7th Edit.

<sup>f</sup> 1 Emerigon, p. 171.

t, assurance nulle. Une frégate, chargée de munitions de CH XVIII.  
 re pour Algesiras, se trouvoit à l'Estaque. Le navire assuré  
 à la voile sous les auspices de cette frégate, qui lui accorda  
 action, et qui partit en même temps. Consulté sur ce cas,  
 is d'avis que si le navire étoit pris par les ennemis, les assureurs  
 ent fondés à refuser le paiement de la perte : car autre chose  
 l'être sous l'escorte d'un bâtiment de roi, et autre chose est de  
 guer simplement sous ses auspices."

convoy appointed by the admiral commanding in chief upon a  
 on abroad is a convoy appointed by Government. Whether the  
 do or do not happen on account of the breach of the warranty,  
 the policy is forfeited ; for in *Hibbert v. Pigou*, the ship insured  
 hed in a storm long after she had joined the regular convoy ;  
 consequently, the loss did not happen on account of the breach  
 ie condition. Having seen what shall be deemed a convoy, let  
 proceed to consider what shall be a departure with convoy, within  
 meaning of a warranty to depart with convoy. The rule on this  
 t is short and clear, that such a warranty implies that the ship  
 go with convoy from the *usual place of rendezvous* at which the  
 have been accustomed to assemble, as Spithead or the Downs  
 he port of London, and Bluefields for all the ports in Jamaica.  
 from the particular port to such usual place of convoy, the ship  
 otected by the policy.<sup>a</sup> Upon this kind of warranty it is to be  
 rved that although the words commonly used are to depart *with*  
*ry*, or *to sail with convoy*, yet they extend to sailing with convoy  
*ghout the whole of the voyage*, as much as if those words were  
 ted.<sup>b</sup> Indeed, to suppose the contrary would introduce an infinite Place of  
 ty of frauds, as a ship would sail out of harbour with the convoy, rendezvous.  
 ine with it for an hour or two, then leave it, and run every  
 at the risk of the underwriter. If, therefore, the convoy is only  
 a part of the way, that is not a compliance with the warranty,  
 the insurer is discharged from his engagements.<sup>c</sup> But although  
 s been thus settled that a ship must depart with convoy for the  
 e of the voyage, yet an unforeseen separation is an accident, to  
 h the underwriter is liable.<sup>d</sup> It is the law of reason and common  
 ; for it would be the height of injustice and cruelty to heap  
 rtune upon misfortune, and to say that because a ship has been  
 ated from her convoy by stress of weather, or the fury of the  
 ents, that the insured shall suffer still greater misery, by being  
 ived of that indemnity which he had secured to himself by pay-  
 t sufficient and adequate premium. The law of England does  
 olerate such principles ; and the first decision upon the subject  
 such that it never has been departed from in any instance.<sup>e</sup> Even  
 e the ship has by tempestuous weather been prevented from  
 ng the convoy at all, at least of receiving the orders of the com-  
 der of the ships of war, if she do everything in her power to

*Aethulier's Case*, 2 Salk, 443; *Gor-*  
*ley*, 2 Stra. 1265.  
*Salk*, 443.  
*Jefferys v. Legendra*, 3 Lev. 320;

*Lilly v. Ewer*, Doug. 72.

<sup>d</sup> 1 *Emerigon*, 166.

<sup>e</sup> *Jeffery v. Legendra*, *suprà*.

*Park on Insurance.* effect it, it shall be deemed a sailing with convoy, within the terms of the warranty.<sup>a</sup> But it is evident from all that has been said, that if there be an opportunity of convoy, if the convoy throw out repeated signals to join, and by the negligence and delay of the captain of the insured ship the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged. Thus, in an action on a policy of insurance tried before *Ld. Mansfield*,<sup>b</sup> the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence that the commodore of the convoy had made signals for sailing from Spithead to St. Helen's the night before, and had made repeated signals the next morning, from seven o'clock till twelve, notwithstanding which the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which she was taken by a privateer.

*Neutral property.* The third and last species of warranty which falls under our consideration is that of neutrality, or that the ship or goods insured are *neutral property*. This condition is very different from either of the two former, for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is absolutely void, *ab initio*, on account of fraud. This ground was entered upon in the chapter of fraud; and the principle on which the difference turns is this. A man may warrant that his ship shall sail with convoy, and if that condition be not complied with it is not his fault, because it depends upon the acts of other men; but still he is the sufferer, for he loses the benefit of his contract. So, also, if he warrant to sail on a particular day and do not, he is guilty of no crime, for that was a circumstance the performance of which depended on a thousand accidents, such as wind, weather, repair, &c.; but as he had expressly undertaken, he loses the effect of his policy by non-compliance. But in neither of these cases, as I have said, is the insured, making such a warranty, guilty of any offence. Not so with him who warrants property to be neutral. That is a fact which, at the time of insuring, must be within his own knowledge, and if he assert it to be neutral, knowing it to be otherwise, he is guilty of a wilful and deliberate falsehood, and incurs moral turpitude. In such a case, therefore, the contract between the parties is absolutely null and void to all intents and purposes.<sup>c</sup> If, however, the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property; because it is impossible for the insured to be answerable for the consequences of a war breaking out during the voyage. The insurer takes upon himself the risk of peace or war; they are public events, equally known to both parties.<sup>d</sup>

Having seen what shall be deemed a compliance with a warranty asserting that the property insured is neutral, and having also considered what effect the breach of such a warranty has upon the contract of insurance, it may be proper to observe, before this chapter

<sup>a</sup> *Victoria v. Cleve*, 2 Stra. 1250.

<sup>b</sup> *Taylor v. Woodness*, 2 Park Ins. 7th Edit. 510.

<sup>c</sup> *Woolmer v. Muilman*, 1 Bl. Rep. 427.

<sup>d</sup> *Eden v. Parkinson*, Dougl. 732; *Saloucci v. Johnson*, and *Fyson v. Gurney*, 3 T. R. 477.

is closed, *how far our courts of law hold the sentences of foreign courts* CH. XIX.  
*to be conclusive evidence* that the property was not neutral, so as to discharge the underwriters. The general rule upon the subject is Sentence of a foreign court, where conclusive.  
 well known that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties and in all countries, as to the fact on which such condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is, at the same time, as well established that, in order to conclude the parties from contesting the ground of condemnation in an English court of justice, such ground must appear *clearly* on the face of the sentence.<sup>a</sup>

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## CHAPTER XIX.

### RETURN OF PREMIUM.

HAVING in several chapters spoken fully of the various cases, in which policies of insurance are either absolutely void, or are rendered of no effect by the failure of the insured in the performance of some of those conditions which he had taken upon himself: the next object of our inquiry will be, in what cases, and under what circumstances, there shall be a return of premium.

In all countries in which insurances have been known, it has been a custom coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium: or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned.<sup>b</sup> If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, I think in that case the underwriter should retain; because, under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event there shall be a return of premium. These clauses have a binding operation upon the parties; and the construction of them is a matter for the court, and not for the jury, to determine.

<sup>a</sup> *Dalglish v. Hodson*, 1 Bing, 504,  
 2 Smith's L. C. 452, where all the cases  
 are collected and commented on with the  
 author's characteristic perspicuity.

<sup>b</sup> *Loccenius de Jure Marit.* 1. 2, c. 5,  
 s. 8; *Code de Commerce*, liv. 2, tit. 2, s.  
 2; *Fisk v. Masterman*, 8 M. & W. 169.

*Park on Insurance.* In short, if the ship, or property insured, was never brought the terms of the written contract, so that the insurer never had any risk, the premium must be returned.<sup>a</sup> The principle, upon the whole of this doctrine depends, is simple and plain, and of no doubt or ambiguity. The risk or peril is the consideration for the premium is to be paid: if the risk be not run, the consideration for the premium fails; and equity implies a contract that the insurer should receive the price of running a risk, if he runs any. It is just like the contract of bargain and sale, for if the thing sold be not delivered, the party who agreed to sell is not liable to pay. Thus, to whatever cause it be owing that the risk is not run, as the money was put into the hands of the insurer merely for the risk of indemnifying the insured, the purpose failed, he cannot have a right to retain the sum so deposited for a special cause.<sup>b</sup> This is well exemplified by the cases of *Oom v. Oom* and *Furtado v. Rogers*.<sup>d</sup> In the latter, the insurance was effected before the commencement of hostilities; and therefore, though hostilities having once attached, there could be no return of premium. In the former, the risk never attached, for the insurance was effected after. But as the party effecting the insurance, in the former case, had no knowledge then of the commencement of hostilities, he was held entitled to a return of the premium. Indeed, as a general rule, if the insurance be illegal, as covering a trading with the enemy, a smuggling transaction, in violation of the Navigation Acts, or the like, the assured cannot recover the premium.<sup>e</sup> But the contract of insurance may be contrary to law, and yet a return of the premium will be adjudged, as, for instance, if the party effecting the insurance be not *in pari delicto* with the insured; if he be then ignorant of the facts constituting the illegality; or if no contravention of the law be meditated by either of the contracting parties.<sup>f</sup>

When the policy is void, merely because the insurance is effected upon a subject matter not insurable; as, for instance, upon a subject advanced to the captain abroad, the assured may recover the premium.<sup>g</sup> A material misstatement or concealment vitiates the contract; but, whether there is to be a return of the premium or not, depends upon the existence or non-existence of *fraud*. If not fraudulent, the premium must be returned; if fraudulent, not.<sup>h</sup> In the case of *Gladstone v. King*,<sup>i</sup> (a case very difficult to understand, in which a concealment of a material fact operated as an exception out

In case of fraud.

<sup>a</sup> *Simond v. Boydell*, Dougl. 255; *Aguilar v. Rodgers*, 7 T. R. 421; *Audley v. Duff*, 2 B. & P. 111; *Kellner v. Le Mesurier*, 4 East, 396; and see *Morrell v. Frith*, 3 M. & W. 404.

<sup>b</sup> *Pothier*, n. 179; 3 *Burr*, 1240; *Roccus*, Not. 88; *Cowp.* 668; *Martin v. Sitwell*, 1 Show. 156.

<sup>c</sup> 12 East, 225.

<sup>d</sup> 3 B. & P. 201.

<sup>e</sup> *Vandyck v. Hewitt*, 1 East, 96;

*Morck v. Abel*, 3 B. & P. 3; *bock v. Potts*, 7 East, 449.

<sup>f</sup> *Henry v. Staniforth*, 4 Car. In *Shiffner v. Gordon*, 12 East, the illegality was known; and see *Ev. Tit. money had and received*.

<sup>g</sup> *Siffken v. Allnutt*, 1 M. & W.

<sup>h</sup> *Anderson v. Thornton*, 12 East, 427; *Southall v. Rigg*, *Forman v. 20 L. J. (C. P.)* 145.

<sup>i</sup> 1 M. & S. 37.

policy, and as it did not avoid the policy, the premium could not be recovered. The famous ordinances of Lewis the XIVth declare, that if the voyage is entirely broken up before the departure of the ship, even by the act of the insured, the insurance shall be void, and the underwriter shall return the premium, reserving one half per cent. for his trouble.<sup>a</sup> This article affords scope to Valin, the very learned commentator upon these ordinances, to point out the advantages which the insured enjoys above the insurer, in being thus able to put an end to the contract, even after it is signed, which the underwriter can by no means effect.<sup>b</sup> Indeed, when we consider that the premium is nothing more than the price of the perils which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay if the insurers run the risk;" it is perfectly consistent with that principle, that when the risk is not run, whatever be the cause, the premium is not due to the insurers.<sup>c</sup> Accordingly, in England, it has always been the custom, when the policy is cancelled, to return the premium, deducting one half per cent.<sup>d</sup> Some of the statutes for preventing the exportation of wool and other staple commodities of the kingdom, and which, in order more effectually to prevent such exportations, declared policies of insurance on those articles to be null and void, enacted that the premium should not be restored to the insured.<sup>e</sup> So, when a policy is void, being made without interest, contrary to the 19 Geo. 2, if the ship has arrived safe, the court will not allow the insured to recover back the premium; according to the old rule of law, *in pari delicto potior est conditio possidentis*.<sup>f</sup>

From the various cases upon the subject of return of premium, as General well as from all that has already been said, it will appear, that in the English law there are *two general rules* established, which govern almost all cases. The first is, that where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or will of the insured, or to any other cause, the premium shall be returned. Another rule is, that if the risk has once commenced, there shall be no apportionment or return of premium afterwards. Hence, in cases of deviation, though the underwriter is discharged from his engagement; yet the risk being once commenced, he is entitled to retain the premium. Though these rules are so plain and simple, that they seem to preclude all possibility of doubt or contention; yet there are few points in the law of insurance, which have given rise to a greater number of causes than those which relate to the subject of this chapter. It ought, however, to be acknowledged, that less litigation has taken place in those instances where the whole of the premium is either to be retained or restored, than in those, where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes divisible, and the court can say, "a part of the premium shall be retained for the risk run, and part

<sup>a</sup> 2 Emerigon, 153; Ord. of Law. 14 tit. Aaa. art. 37; Code de Commerce, liv. 2, tit. 2, s. 2.

<sup>b</sup> 2 Val. 93.

<sup>c</sup> Pothier, No. 79.

<sup>d</sup> Molloy, l. 2, c. 7, s. 12.

<sup>e</sup> 12 Geo. 2, c. 21.

<sup>f</sup> Andree v. Fletcher, 3 T. R. 266; Lowry v. Bourdieu, Dougl. 468.

*Park on Insurance.* shall be returned as the risk has never commenced." This seems to be a refinement upon the rules just established; but it must, at the same time, be admitted, that when it can be accomplished, it is a refinement perfectly consistent with equity and good conscience. The one rule has provided, that if the risk be once begun, there shall be no return: but the other rule has said, and equity has also said, that a man shall not be paid for a risk which he has never incurred; from whence the deduction is easy and natural, that if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, although both are contained in one policy.<sup>a</sup> But this principle cannot be applied to one like the following:—an insurance for 12 mos. at 9*l.* per cent.; and because the ship was captured within 2 mos. after the contract was made, a return of premium was demanded. But the *contract* in this case was *entire*; the premium was a gross sum stipulated and paid for 12 mos., and the parties, when they made the contract, had no intention or thought of a subsequent division or apportionment.<sup>b</sup> The two cases last cited were insurances upon *time*: but from the principles laid down in them, and in the former case of *Stevenson v. Snow*, it seems perfectly clear, that when the contract is *entire*, whether it be for a specified time, or a voyage, there shall be no apportionment or return, if the risk has once commenced. And therefore where the premium is *entire* in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, *nor any usage established upon such voyages*; although there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable.<sup>c</sup>

*Over-insurance.* When several insurances have been effected at different times, *but before the risk commences*, and there is an over-insurance, it would seem, that the return is to be on all rateably.<sup>d</sup> But where an insurance was effected on the 12th of April, *on a cargo of cotton then at sea*, by five several policies at the rate of 50 guineas per cent.; and on the 13th, news of the vessel's safety having arrived, a further insurance was *bonâ fide* effected by six different policies at 10 and 5 guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject matter insured, but the former itself did not;—Held, that the assured were entitled to a return of the premium on the amount of the over-insurance, to which the underwriters, who subscribed the policies of the 13th of April, were to contribute rateably, in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies); but that no return of premium was to be made in respect of the policies effected

<sup>a</sup> *Stevenson v. Snow*, 3 Burr, 1237.

<sup>b</sup> *Tyrie v. Fletcher*, Cowp. 666; *Lorraine v. Thomlinson*, Dougl. 564.

<sup>c</sup> *Bermon v. Woodbridge*, Dougl. 751; *Meyer v. Gregson*, Gale v. Machel,

*Long v. Allen*, 2 Park Ins. 7th edit. 590.

<sup>d</sup> *Marshall on Ins.* 649, cited in *Fisk v. Masterman*, 8 M. & W. 169.

on the 12th.<sup>a</sup> "I am aware (says Ld. Mansfield) that there are CHAP. XX. great difficulties in the way of apportionments: and therefore the court has sometimes leaned against them. *But when an express usage is found by the jury*, the difficulty is cured." In the case before him, the jury found an usage to return the premium, deducting  $\frac{1}{4}$  per cent.<sup>b</sup>

In *Boddington v. Castelli*<sup>c</sup> (which was an action of assumpsit to recover a partial loss on a valued policy in goods on a voyage to a market: premium 60s. per cent., to return 23s. 9d. if landed in the U. K.), the defendant pleaded a set off for premium. But both the Court of Q. B. and the Exch. Chamber held the plea bad, as the action was for unliquidated damages. In the case lastly cited, the right to sue for a return of the premium was transferred to the bankrupt's assignees; but it was held that the bankrupt might sue in his own name, as trustee, for that cause of action in which he had no beneficial interest at the time of his bankruptcy. Set off.

## CHAPTER XX.

### PROCEEDINGS UPON POLICIES OF INSURANCE.

IN the present chapter it is intended to point out in what manner and by what form of legal proceeding a man, who has insured property and has sustained a loss, is to recover against the underwriters upon the policy. The Court of Policies of Insurance erected in the time of *Q. Eliz.*, soon fell into disuse;<sup>d</sup> and since that period all questions of this nature have been decided by the usual mode of trial, known to the laws and constitution of this country, namely, the trial by jury in the courts of *common law*. Cases of this nature At law or are not the subject of inquiry even in a court of *equity*, because the equity. demand is plainly a demand at law; and the loss and damage sustained are as much the object of proof by witnesses, as any other species of damage whatever.<sup>e</sup>

There may, it is true, be cases where an application to a court of *equity* on the part of the insured, is strictly proper, and will be entertained. For instance, if the trustee in a policy of insurance do actually refuse his name to the *cestui que trust* in an action at law, there may be some pretence for going into a court of equity, as Ld.

<sup>a</sup> *Ib.*

<sup>b</sup> *Long v. Allen*, 2 Park Ins. 7th dit. 590.

<sup>c</sup> 1 E. & B. 879.

<sup>d</sup> *Lex Merc. Red.* 4th edit. 292.

<sup>e</sup> *De Ghetoff v. the L. Ass.* 3 Brown's P. C. 525.



*Park on Insurance.*

Hardwicke has once observed.<sup>a</sup> Or, if, from a concurrence of circumstances, the persons whose testimony is requisite to the decision of some disputed facts, reside abroad, the Court of Chancery will grant a commission to examine those witnesses. But it is not upon a mere general trust, or the loose suggestions of any of these facts, that this extraordinary interposition will take place.<sup>b</sup> There are also cases in which the insurers may go into equity, to obtain injunctions to stay the proceedings against them at law, where the evidence of persons abroad is requisite for their defence; in which situation they shall have a commission to examine witnesses abroad, and an injunction to stay proceedings at law in the mean time. Another ground for an application to a Court of Equity, is a suspicion of fraud on the part of the insured, and of which I fear the chapter on fraud produces too many instances: in such cases the court will compel the party charged to make a full disclosure upon oath of all the circumstances that are within his knowledge, and to deliver up all papers and documents that are at all material to the question. If the parties, by a clause in the policy, agree that in case of a dispute the amount shall be first of all referred to arbitration, that will be a sufficient bar to an action at law, provided no reference has been in fact made, nor is depending.<sup>c</sup>

Form of action.

Having thus seen in what courts a party to a contract of insurance may seek for redress, let us consider by what form of proceeding that redress is to be obtained. Before the *Common Law Procedure Act*, 1852, it was necessary to inquire whether this policy was under seal or not, in order to determine whether the action was to be in *covenant*, or *debt*, or *assumpsit*. But as the *forms* of action are by that act virtually abolished, the inquiry is this: is it a specialty or a simple contract? not so much for the purposes of the declaration as to determine the character of the plea. There is no precedent of a declaration given in the act, but it is evident that the first thing which is necessary for the plaintiff to insert in his declaration, or state of the case, will be the policy itself, because that is the foundation of the whole. He should also state that it was signed by the defendant. The next averment will be, that in consideration of the premium being paid, the defendant had undertaken to indemnify against the losses specified in the policy. (We saw in the first chapter of this book, that the premium was the consideration upon which the whole contract rested; and that, by the custom, the receipt of the premium was acknowledged in the body of the policy.) It is then necessary for the plaintiff to allege the performance of all warranties, if any,<sup>d</sup> that goods and merchandises were laden on board to the amount of the sum insured, and that the plaintiff was interested therein at the time of the loss;<sup>e</sup> or if the insurance be upon the ship, the insured's interest must, in the same,

Averments in declaration.

<sup>a</sup> 1 Atk. 547, 2 Ib. 359. Where a bankrupt may proceed at law as trustee, see *Boddington v. Castelli*, 1 E. & B. 879.

<sup>b</sup> *Powles v. Innes*, 11 M. & W. 13; *Chitty v. Selwin*, 2 Atk. 359.

<sup>c</sup> *Avery v. Scott*, and *Scott v. Avery*, 8 Exch. 487.

<sup>d</sup> See *Hutchinson v. Read*, 4 Exch. 761.

<sup>e</sup> *Rhind v. Wilkinson*, 2 Taunt. 237. *Powles v. Innes*, 11 M. & W. 12 *dist.*; *Sutherland v. Pratt*, 2 Dowl. N. S. 821; on a policy on goods, *lost or not lost*. As to description of interest, see *Ellis v. Lafone*, 8 Exch. 546.

be averred. If it be made part of the policy that the CHAP. XX.  
 lone of the association of which defendant is a member are  
 the existence of them must be averred.<sup>a</sup> The next material  
 point is, that the property insured was lost, and by what means  
 it happened; in stating which, the plaintiff must bring it with-  
 out of the perils insured against by the policy, but he must always  
 according to the truth. Thus he ought to show, that it was Loss how  
 lost of the sea, by capture, by fire, by detention, by barratry, or alleged.  
 the other perils mentioned in the policy.<sup>b</sup> Where the loss  
 was by barratry, the breach was thus assigned (the proceedings  
 at that time in Latin) *per fraudem et negligentiam magistri*  
*expressa et submersa fuit, et totaliter perdita et amissa fuit*;  
 it was insisted that this was not within the meaning of the word  
*barratry*, but the breach should have been express, that the ship was  
 the barratry of the master. The Court were unanimously of  
 opinion that there was no occasion to aver the fact in the very words of  
 the policy; but if the fact alleged came within the meaning of the  
 policy it was sufficient. Barratry imports fraud, and he  
 who commits fraud may properly be said to be guilty of a neglect,  
 and a breach of duty. It is true that the practice at present, as  
 a reason to believe from precedents which I have seen settled  
 by ablest special pleaders, is to aver such a loss to have happened  
*barratry of the master or mariners*. If the plaintiff in his de- Damages.  
 claration allege that a *total loss* has happened, and lay the damages  
 as a *total loss*, it shall be no bar to his recovery, though he can  
 prove a *partial loss*; for in an action for damages merely, a  
 plaintiff always recover less but never more than the sum he has  
 in his declaration.<sup>c</sup>

Reg. Gen. Hil. T., 16 Vict., it is provided that "in actions on Interest  
 of assurance, the interest of the assured may be averred thus: how averred.  
 "A, B, C, and D [or some or one of them], were or was interested,"  
 and it may also be averred "That the insurance was made for  
 and benefit and on the account of the person or persons so  
 named." An attempt was once made to non-suit a plaintiff be-  
 cause declaration alleged that he had a *smaller interest* than he  
 declared in proof to have. But this attempt failed.<sup>d</sup> It was an  
 action on a policy of insurance, in which the declaration stated that  
 the plaintiff was possessed of  $\frac{1}{3}$  of the ship on which the insurance  
 was made. It was proved that the plaintiff had purchased the whole  
 of the ship for one period; and as there was no evidence to show that  
 he had since parted with any share of it, the counsel for the defend-  
 ant insisted that the plaintiff had not proved his declaration, which  
 required him to have but one-third. Lord Mansfield overruled the  
 objection, saying that this was *prima facie* sufficient evidence; for  
*magis continet in se minus*." A person who assigns away his Assignment  
 interest in a ship or goods, after effecting a policy of insurance upon of policy.  
 the goods, and before the loss, cannot sue upon the policy, except as a

Reg. v. Dowdall, 21 L. J. Q. B.

<sup>a</sup> Gardiner v. Crosedale, 2 Burr. 904;

1 Black. Rep. 198.

Reg. v. Cambridge, 2 Ld. Raym.  
 Stra. 581.

<sup>d</sup> Page v. Rogers, Sitt. at Guildhall,  
 Hil. Vac. 1785.

*Park on Insurance.* trustee for the assignee. Whether he can sue in that capacity depends upon circumstances.<sup>a</sup> A bankrupt may sue in his own name as trustee for a cause of action in which he has ceased, by assignment, to have any beneficial interest at the time of his bankruptcy.<sup>b</sup> It is no answer to an action on a policy on goods lost or not lost that the interest in them was not acquired until after the loss.<sup>c</sup>

When policy effected in broker's name.

We have seen that policies of insurance are seldom effected by the party himself really interested, but generally by the intervention of a broker employed by the insured, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions, and from which, if he deviate, he is answerable to his employer in an action on the case, like any other person who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill. It is also common for the broker to open the policy in his own name, at the same time declaring for whose use, benefit, or interest the same is made; which latter declaration by statute is rendered absolutely necessary. As the policy may be made in the name of the broker, so also may the action be brought in his name, as was done in the case of *Godin v. London Ass. Co.*, and a variety of other cases.<sup>d</sup>

As this contract depends so much upon the purest good faith and the most liberal communication of circumstances relative to each particular case, when gaming insurances, without interest, were abolished by the legislature, in order effectually to answer the purpose intended it became necessary to order that a disclosure of all insurances effected on the same property should be made, even after an action brought. Thus it was declared, "That in all actions or suits brought or commenced by the assured upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, should, within 15 days after he or they should be required so to do in writing by the defendant, or his attorney or agent, declare what sum or sums he had assured or caused to be assured in the whole, and what sums he had borrowed at respondentia or bottomry, for the voyage in question in such suit or action."<sup>e</sup>

Pleas.

If the contract declared on be a simple contract, the plea of *non assumpsit*, or a plea traversing the contract or agreement, will put in issue the fact of making the express contract or agreement alleged; and all matters in confession and avoidance, not only those by way of discharge but those which show the transaction to be void or voidable in point of law, as fraud, unseaworthiness, misrepresentation, concealment, alteration, and the like, must be specially pleaded. If it be a sealed contract, the plea of *non est factum* operates as a denial of the execution of the deed in fact only, and all other defences must be specially pleaded.<sup>f</sup> Money may be paid into Court, by leave of the Court or a judge.<sup>g</sup>

<sup>a</sup> *Powles v. Innes*, 11 M. & W. 13.

<sup>b</sup> *Boddington v. Castelli*, 1 E. & B. 379.

<sup>c</sup> *Sutherland v. Pratt*, 2 Dowl. N. S. 821.

<sup>d</sup> 1 Burr. 490; 25 Geo. 3, c. 44; see also 28 Geo. 3, c. 56.

<sup>e</sup> 19 Geo. 22, c. 37, s. 6.

<sup>f</sup> Reg. Gen. Hil. T. 1853.

<sup>g</sup> 15 & 16 Vict. c. 76, s. 70.

Issue being thus joined between the parties, the next object for CHAP. XX. our consideration is the proof which it will be necessary for the plaintiff to produce, in order to support his case. This enquiry will be rendered very easy, by reflecting upon those allegations which, as we have before shown, it is incumbent upon the plaintiff to insert in his declaration. The first evidence to be given is, that the defendant's hand-writing is subscribed to the policy, or that of his authorised agent. This, in the liberality of modern practice, is seldom required to be done, as the subscription is usually admitted, but in strictness it may be insisted on; and in a work of this nature it is my business to point out everything which either party is expected or compellable to perform. When the signature is once proved, the court and jury are in possession of the extent of the contract (except as it may be further extended by usage), the conditions to be performed on either side, and all the other circumstances relative to the risk insured; and although in the course of our enquiries we have seen frequent instances where the usage and practice of a particular trade control and extend the written words of a policy, yet in no case shall evidence of any agreement be allowed which directly tends to *contradict* the policy; for to suffer them to be defeated by agreements by parol, not appearing, would be greatly to diminish their credit, and to render them of no value.<sup>a</sup> Evidence.

The declaration in *Hallett v. Dowdall*,<sup>b</sup> was for a total loss on a policy on a ship and cargo, and stated that the defendants were shareholders of and partners in *The General Mar. Ass. Co.*; that they executed the policy which, in effect, made the funds alone of the company liable: and that the funds were sufficient: to this there was a demurrer by one defendant, and pleas of N.A. and traverse of sufficiency of funds by another. On the trial of the issues of fact the plaintiff proved that the defendants were all *shareholders* and one of them a *director*, and put in the deed of settlement and the policy. The deed of settlement showed, amongst other things, that the clause above alluded to was an essential feature of the company, that the directors issuing the policy were not to be responsible, and that no proprietor was to be liable beyond the amount of his unpaid shares. The policy was signed by three directors, none of whom were defendants. It purported to be made between the company and the assured, and contained the restrictive clauses stated in the declaration.<sup>c</sup> Evidence was also given that only a portion of the shares had been subscribed for, and only a quarter of those shares paid up. It was then proved on behalf of the defendants that, neither at the time of the loss nor since, had the company any available funds in their hands, out of which they could pay the plaintiff. Held on the demurrer that the declaration disclosed a *joint* contract by all the defendants. Held, on a Bill of Exceptions, that the deed of settlement, the policy, and the facts proved, contained no evidence of such *joint* contract.

<sup>a</sup> See *Wigglesworth v. Dallison*, 1 Smith, L. C. 306.

<sup>b</sup> 21 L. J. Q. B. 98.

<sup>c</sup> As to these restrictive clauses see also 13 Q. B. 960 and 4 Exch. 525.

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Interest in goods how proved.

Property in ship how proved.

Proof of loss.

The policy not only proves the extent and nature of the contract, but it also establishes another allegation in the plaintiff's declaration, namely, that the premium was paid; for it was formerly shown<sup>a</sup> that every policy contains the following clause: confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of      per cent. The plaintiff having averred in his declaration that he is interested to the amount of the property insured, it is absolutely necessary that this allegation should be proved. This he must do by a production of all the usual documents, such as the bills of sale, bills of parcels, and the costs of the outfit, the bills of lading,<sup>b</sup> signed by the master, specifying the goods received on board and for whom he is to carry them, custom-house clearances, and every other paper which may be thought necessary to substantiate his right to the property. It is usual, also, to call the captain or some other person to prove that the goods mentioned in it were actually on board. The property of a ship may be proved by parol evidence of the possession of the assured; the mere fact of possession by one as owner being sufficient *prima facie* evidence of ownership, without the aid of any documentary proof. In the case which determined this, such parol evidence was held not disproved by showing a prior register in the name of another in 1799, and a subsequent register to the same person in 1802, as it was quite consistent with a title in other persons *in the mean time*, agreeable to the averment in the declaration.<sup>c</sup> But, as a certified or an examined copy of the register is so easily to be had, it is advisable to secure this kind of evidence.

It is, in the last place, incumbent on the plaintiff to prove that a loss has happened, and that, by the very means stated in the declaration. It is absolutely necessary that this rule should be strictly adhered to; for, otherwise, the insurers would come into court prepared to defend themselves against one charge and one species of loss; and they would then be obliged to resist a demand upon a quite different ground.<sup>d</sup> But where a loss is averred to be by perils of the sea, and some of the goods insured are spoiled, and others saved, it is allowable to give the expense of the salvage in evidence upon such an averment, because it is a consequence of the accident laid in the declaration. In an action on a policy of insurance, for insuring goods on board the ship A., the plaintiff declared that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled.<sup>e</sup> The evidence was, that many of the goods were spoiled, but some were saved; and the question was, whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration. *Ld. Hardwicke Ch. Just.*—I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the

<sup>a</sup> *Ante*, p. 14.

<sup>b</sup> See *Caldwell v. Ball*, 1 T. R. 295.

<sup>c</sup> *Robertson v. French*, 4 East, 136.

<sup>d</sup> *Kulen Kemp v. Vigne*, 1 T. R. 304.

<sup>e</sup> *Cary v. King*, *Cas. Temp. Hardwicke*.

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common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it, it is so in this case, for they have laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen.

As the right of *freight* results from the right of ownership of the ship, the evidence, when this insurance is on freight, will be substantially of the same kind.<sup>a</sup>

Upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned, and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and, in either case, if the policy be open, the sum payable to the shipowner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable.

The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if, by a peril insured against, the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be open, and the assured can only recover as for that proportionate share. But if there be a loss by a peril insured against of the *whole* subject-matter of the insurance to which the valuation applied, as of *all* the *intended* freight, when the insurance is on freight, the valuation in the policy will not be opened.

## CHAPTER XXI.

### BOTTOMRY AND RESPONDENTIA.

THE contract of bottomry is in the nature of a mortgage of a *ship* or ship and freight,<sup>b</sup> when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or bottom of the ship, or ship and freight, as a security for the repayment; and it

<sup>a</sup> See *Stewart v. G. M. Ins. Co.* 2 H. of L. Cases, 159; *Forbes v. Aspinall*, 13 East, 325.

<sup>b</sup> The master cannot *mortgage* the ship. *Stainbank v. Fenning*, 11 C.B. 84; *Stair-*

*bank v. Shepard*, 22 L. J. (Exch.) 341. He may *hypotheate* (pledge) and, in a case of necessity, *sell* her. *Hunter v. Parker*, 7 M. & W. 342. *Ireland v. Thomson*, 4 C. B. 168.

Part on Insurance. is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed 5 per cent. In this consists the difference between bottomry and respondentia; that the one is a loan upon the ship, or upon ship and freight, the other upon the goods; in the former, the ship and tackle, or ship, tackle and freight, as the case may be, are liable; in the latter, recourse must be had to the person only of the borrower.<sup>a</sup> Another observation is, that in a loan upon bottomry, the lender runs no risk though the goods should be lost; and upon respondentia the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of respondentia are upon the same footing; the rules and decisions applicable to one are applicable to the other; and therefore in the course of our inquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.<sup>b</sup>

Nature of contract.

"By the Roman law, (says *Jervis Ch. Just.*<sup>c</sup>), and still in those nations which have adopted the civil law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship without a formal instrument of hypothecation. But by the law of England, no such right can be acquired, except by express agreement, and a master can only make such an agreement if he act within the scope of his authority. The raising of money upon bottomry can only be justified by necessity. If the master in a foreign country wants money to repair or victual his vessel, or for other necessities, he must in the first instance endeavour to raise it upon the credit of his owners. If he can do so, he has no authority to hypothecate the vessel; but if he cannot otherwise obtain the money he may *hypothecate* the ship; *not transferring the property in the ship, but giving the creditor a privilege or claim upon it*, to be carried into effect by legal process upon the termination of the voyage. As incident to this transaction, the lender may, if he think fit, insist upon maritime interest,<sup>d</sup> but whether he do so or not, the advance is made upon the credit of the ship not upon the credit of the owner, and the owner is never personally responsible."

These terms are also applied to another species of contract, which does not exactly fall within the description of either; namely to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself, which since the repeal of our usury laws, would seem in all cases to be a valid contract.<sup>e</sup>

<sup>a</sup> The lender may demand the additional security of the cargo, and bind all by the same bond. *The Ld. Cochrane*, 2 Wm. Rob. 328.

<sup>b</sup> 2 Valin, Com. p. 4.

<sup>c</sup> *Stainbank v. Fenning*, 11 C. B. 57; *Duncan v. Benson*, 1 Exch. 555.

<sup>d</sup> The usury laws are abolished, as to

any contract for the loan or forbearance of money, above 10*l.* by the 2 & 3 Vict. c. 37; continued, lastly, by 13 & 14 Vict. c. 56.

<sup>e</sup> See 7 Geo. 1, c. 21, s. 2; 19 Geo. 2, c. 37, s. 5; 2 Bl. Comm. 458; *Molloy* b. 2, c. 11, 8; *Code de Commerce*, liv. 2, tit. 9.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to *hypothesize* the ship in order to raise money to refit.<sup>a</sup> Such a permission is absolutely necessary, and is impliedly given him in the very act of constituting him master, not indeed by the common law, but by the marine law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessities, it is better that the master should have it in his power to pledge the ship and goods, or either of them, than that the ship should be lost, or the voyage defeated.<sup>b</sup> But he cannot do either for any debt of his own, but merely in cases of *necessity*, and *for completing the voyage*.<sup>c</sup> Although the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation, yet the very same authority which gave that power in those cases formerly, it would seem, denied it when he happened to be in the same place where the owners resided. But it is not so now; for the authority of the Admiralty Court to take cognizance of such bonds does not now, at least, depend upon the locality of the owners' residence, but upon the necessity of the case; and, on this principle, a bond given by the master of a British vessel in a port of this country was upheld.<sup>d</sup>

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The contract of which we treat is of a different nature from almost all others; but that, which it most nearly resembles, is the contract of insurance: for the lender on bottomry or at respondentia runs almost all the same risks, with respect to the property on which the loan is made, that the insurer does with respect to the effects insured.<sup>e</sup> There are, however, some considerable distinctions; for instance, the lender supplies the borrower with money to purchase those effects, upon which he is to run the risk: not so with the insurer. There are also various other distinctions. But however similar they may be in other respects, they differ very much in point of antiquity. We have formerly endeavoured to show, that the contract of insurance was certainly unknown to the traders of the ancient world; but it is equally clear that with the contract of bottomry and respondentia, or what was equivalent to it, they were perfectly acquainted. In those fragments of the famous sea-laws of the Rhodians, which have been preserved and transmitted to our time, I think there are very evident traces of this species of contract.<sup>f</sup>

In our definition of bottomry it was said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceed five per cent rate. The true principle, upon which this was allowed, before the repeal of our usury laws, was, not merely the great profit and convenience of trade, as is frequently urged, but the risk which the lenders run of losing both principal and interest; for he runs the contingency of

<sup>a</sup> 2 Black. Comm. 457.

<sup>b</sup> *Barnard v. Bridgeman*, Moor 918; Hobart, s. c. 11.

<sup>c</sup> Molloy, b. 2, c. 2, s. 14; Leg. Oler. art. 1 & 22, and herein *post*, *Master's*

*authority*.

<sup>d</sup> The Trident, 1 Wm. Rob. 29.

<sup>e</sup> Pothier, Tr. du pret. à la Grosse Avant. Not. 6.

<sup>f</sup> Leg. Rhod. s. 1, art. 25.



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winds, seas, and enemies.<sup>a</sup> It was deemed, therefore, of the essence of a contract of bottomry, that the lender run the risk of the voyage, and that both principal and interest should be at hazard; for if the risk went only to the interest of premium, and not to the principal also, though a real and substantial risk were inserted, it was a contract against the statute of usury, and therefore void.<sup>b</sup> In England, then, it is clear, that, before the repeal of the usury laws, there was nothing unlawful in the contract of bottomry; on the contrary, that it was a fair and conscientious contract, highly beneficial to the commerce and general interests of society. Pothier and Emerigon have proved to demonstration, that even the fathers of the Church have acknowledged, that this contract has nothing in it offensive to religion or good morals.<sup>c</sup> Almost all the writers of eminence agree with them as to the legality of loans on bottomry and at respondentia, and it is now universally admitted and practised in all the maritime and trading countries in Europe.<sup>d</sup>

Hazard run basis of contract.

But, as the hazard to be run was the very basis and foundation of the contract, it followed that if the risk was not run, the lender could not be entitled to the extraordinary premium.<sup>e</sup>

The French writers also say that in such a case, "L'emprunteur sera bien obligé de rendre la somme qui lui a été prêtée, mais il ne sera pas obligé de payer en outre la somme qu'il a promis de payer pour le profit maritime; car le profit maritime étant le prix des risques que le prêteur devoit courir des effets sur lesquels le prêt a été fait, il ne peut lui être dû de profit maritime *quand il n'a couru aucuns risques* ne pouvant pas y avoir un prix des risques, *s'il n'y a pas eu de risques.*"<sup>f</sup> Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from L. to such a port abroad, &c. In such cases the contingency does not commence till the departure; and therefore if the ship receive injury by storm, fire, &c., before the beginning of the voyage, the person borrowing alone runs the hazard.<sup>g</sup> But if the condition be *that if the ship shall not arrive at such a place by such a time, then, &c.*, in these instances the contract commences from the time of sailing, and a different rule as to the loss will necessarily prevail. The payment of the money borrowed must be made to depend on the arrival of the ship.<sup>h</sup> It is essential, also, to such a bond that maritime risk be expressed, or be inferable from its contents.<sup>i</sup> Maritime interest is important only in determining the character of the instrument.<sup>k</sup> An additional security, as a bill of exchange, in no way impairs the general validity of such a bond.<sup>l</sup> It is assignable, so that the assignee may

<sup>a</sup> Molloy, lib. 2, c. 11, s. 8, 13; 2 Vez. 148.

<sup>b</sup> Sharpley v. Hurrell, Cro. Jac. 208; Joy v. Kent, Hardr. 418; Sayer v. Glean, 1 Lev. 54; 4 Com. Dig. 193.

<sup>c</sup> Poth. Avantage à la Grosse, Not. 2; 2 Emer. 390; *Des Contrats à la Grosse*, in the Code de Commerce, liv. 2, tit. 9.

<sup>d</sup> Loc. lib. 2, c. 6, Not. 3; Roc. de Navi. et Naul. not. 50, 2 Bl. Com. 457.

<sup>e</sup> De Guilder v. Depeister, 1 Vern. 263.

<sup>f</sup> Pothier, Traité à la Grosse Avantage, Not. 38, 2 Valin, 10.

<sup>g</sup> Beaves lex Merc. Red. 4th edit. p. 127.

<sup>h</sup> Stainbank v. Fenning, 11 C. B. 89.

<sup>i</sup> The Emancipation, 1 Wm. Rob. 124.

<sup>k</sup> 1b.

<sup>l</sup> The Ld. Cochrane, 2 Wm. Rob. 336; the Emancipation, 1 Ib. 124; the Ariadne, 1b. 420.

institute a suit in his own name.<sup>a</sup> It must be construed by the tenor of its contents alone.<sup>b</sup> It is no objection to such a bond that it is given to the consignee of the cargo or to a ship agent.<sup>c</sup> No person is entitled to make advances on bottomry who, at the time of making them is a debtor to the vessel in whose account the assurances are made.<sup>d</sup> If the bond be fraudulently obtained, a court of equity will restrain proceedings upon it in the Admiralty Court.<sup>e</sup> The suitor in the Admiralty Court may, at his election, proceed by act, or petition or by plea and proof.<sup>f</sup> In all cases of bottomry, the Admiralty Court has power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied; and the title so confirmed by the Court is good against all the world.<sup>g</sup> As already stated, a bond given by the master of a British vessel in a port of this country was upheld;<sup>h</sup> the authority of the Admiralty Court to take cognizance of such bonds not depending upon the locality of the owner's residence, but upon the necessity of the case; but the case cited was one of very peculiar circumstances. It is competent for the merchant, without any express agreement for a bond, to make advances on the security of the ship, that is, upon the faith of a lien on the ship, given by the law of his own country; and it is not necessary for him to have a bond or an agreement for one until the ship is about to sail. But if the money be advanced on personal credit only, the law of lien will not entitle any one to convert what was in origin a transaction of personal credit into one of bottomry.<sup>i</sup> Such a bond cannot, it seems, be given before the commencement of the voyage, nor can it be given for debts incurred on a former voyage and for a different purpose.<sup>k</sup> In the case of the *Hebe*, however, it was held that advances made for the service of the ship to pay debts *bonâ fide* incurred before, might be included.<sup>l</sup> Proof of the necessity lies on the merchant, but with the *expediency* of the repairs, and the like, he seems to have nothing to do.<sup>m</sup> A bottomry bond may be good in part and bad in part.<sup>n</sup> When there are several bonds, and one is secured on the ship and freight, and another on the ship, freight, and cargo, the Court of Admiralty, sitting as a Court of Equity, will marshal the assets. The ship and freight form the primary resources for the discharge of such bonds, and the cargo is only liable when these resources are exhausted. So, as a general rule, when ship and freight belong to different persons, the bond is to be paid by both, *pro rata*; and without the bondholders' movement or concurrence, the Admiralty Court will bring one or the other into contribution.<sup>o</sup> When one bond is upon the ship and another on the cargo, demands

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When sale decreed.

When there are several bonds

<sup>a</sup> *Ib.*

<sup>b</sup> *Ib.*

<sup>c</sup> 1 Dods, 278.

<sup>d</sup> The *Hebe*, 2 Wm. Rob. 150.

<sup>e</sup> *Glascott v. Lang*, 3 Myl. & Cr.

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<sup>f</sup> The *Minerva*, 1 Wm. Rob. 169.

<sup>g</sup> The *Tremont*, *Ib.* 164.

<sup>h</sup> The *Trident*, *Ib.* 29, *ante*, p. 109;

see the *Lochiel*, 2 *Ib.* 45.

<sup>i</sup> *Vibilla*, 1 Wm. Rob. 1; the *Trident*, *Ib.* 34; see also the *Ariadne*, 420.

<sup>k</sup> See the *Jenny*, 2 Wm. Rob. 5; the *Lochiel*, *Ib.* 45.

<sup>l</sup> 2 Wm. Rob. 413.

<sup>m</sup> *Ib.*

<sup>n</sup> The *Hearts of Oak*, 1 Wm. Rob. 215; the *Queen*, 2 *Ib.* 437.

<sup>o</sup> The *Dowthorpe*, 2 *Ib.* 85.

*Park on Insurance.* for pilotage, towage, and seamen's wages must be satisfied *pro rata*, out of the proceeds of ship and freight.<sup>a</sup> As a general rule, such a bond does not become due until the voyage for which it was given is completed; but if the completion be prevented by the act of the master, or by circumstances beyond the control of the bondholder, payment of it may be at once enforced in the Admiralty Court.<sup>b</sup> The successful suitor in a cause of damage has a lien upon and can demand to the full extent of the owner's interest in the vessel. His lien is paramount to the claim of a bondholder prior to the time when the damage is done; it also extends, in case of deficiency of proceeds, to subsequent accretions in the value of the ship arising from repairs effected at the expense of the owner. When money has been advanced and repairs effected by a stranger, and a bottomry bond has been *bond fide* given for the amount of such repairs, the subsequent bondholder, it would seem, has a lien upon the proceeds to the extent of the increased value of the vessel arising from the repairs.<sup>c</sup>

*Risks.* It remains to be seen what those risks are to which the lender undertakes to expose himself. These are, for the most part, mentioned in the condition of the bond, and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. "Limita hoc singulariter, ut creditor subeat periculum navigationis, in casibus fortuitis tantum."<sup>d</sup> These accidents are, tempests, pirates, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself on which the loan is made, or from the misconduct of the borrower;<sup>e</sup> for, says the Italian lawyer last quoted, in continuation of the above sentence, "Secus est si infortunium, vel naufragium ex culpa debitoris processerit quia tunc creditor non tenetur de periculo, et damno, in quod incurritur ex culpa vehentis, prout in simili deciditur in materia assecurationis, ut quantumcumque assecuratio sit generalis, non contineat periculum, aut damnum, quod facto assecurati contingit."<sup>f</sup> It seems to have been a doubt late in the last century whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the *K. B.*, in the reign of James II. But the Court were of opinion that piracy was one of the dangers of the seas, and the defendant had judgment.<sup>g</sup> The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds capture does not mean a mere temporary taking, but it must be such a capture as to occasion a *total loss*. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited (if time be mentioned in the condition), the bond is not forfeited, and the obligee may recover.

In *Thomson v. R. E. Ass. Co.*,<sup>h</sup> it was held that an assured on bottomry could not recover against the underwriter unless there had

<sup>a</sup> The *Trident*, 1 Wm. Rob. 29; La *Constancia*, Ib. 460.

<sup>b</sup> The *Armadillo*, 2 Ib. 255; the *Dante*, Ib. 428.

<sup>c</sup> The *Aliene*, 1 Wm. Rob. 111.

<sup>d</sup> *Roc. de Nav. Not.* 51.

<sup>e</sup> 2 *Valin.* 14.

<sup>f</sup> *Rocc. Not.* 51.

<sup>g</sup> *Barton v. Wolliford*, Comb. 56.

<sup>h</sup> 1 M. & S. 30, and see 11 C. B. 51.

been an *actual* and total destruction of the ship; that if it exist *in specie* in the hands of the owner, though under circumstances that would entitle the assured to abandon in a common case, it would prevent its being a total loss within the meaning of a bottomry bond. This is still sound law, but must be taken subject to the construction put upon the words *exist in specie* by several authorities already referred to.<sup>a</sup> CH. XXI.

A lender on bottomry, or at respondentia, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average.<sup>b</sup>

In *Power v. Whitmore*,<sup>c</sup> it was held that the insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country), who is obliged by the decree of a Court there to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants obtaining in the foreign country to treat the same as general average.

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation.<sup>d</sup>

There seems to be no restriction by the law of England as to the persons to whom money may be lent on bottomry, or at respondentia.

The Bankrupt Consolidation Act,<sup>e</sup> 1849, provides that "The obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing of the fiat or the filing of the petition for adjudication of bankruptcy against such obligor or insurer, and the person effecting any policy of insurance upon ships or goods with any person (as a subscriber or underwriter) having become or becoming bankrupt shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the United Realm." Proof in bankruptcy.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent: and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of money lent. In a former chapter, much was said of the mode by which insurances on such property were to be

<sup>a</sup> *Ante*, ch. 9.

<sup>b</sup> 3 Dougl. 164.

<sup>c</sup> 4 M. & S. 141.

<sup>d</sup> *Western v. Wildy*, Skin. 152;

*Williams v. Steadman*, Holt. 126; 1 Equity Cas. Abr. 372; 2 Chanc. Ca. 130.

<sup>e</sup> 12 & 13 Vict. c. 106, s. 174.

Park on In- effected ; \* and we then saw that it was necessary to insert in  
surances. policy that the interest insured was bottomry or respondentia, that such was the law and practice of merchants. From this too, it is evident, that when a person has insured a bottomry respondentia interest, and he recovers upon the bond, he can also recover upon the policy : because he has not sustained a loss within the meaning of his contract ; and to suffer any man to recover a double satisfaction, would be contrary to the first principle of insurance law. As it is merely a contract of indemnity, a man can never receive less ; nor can he be entitled to recover more than the amount of the damage he has, in fact, sustained.

\* *Ante*, p. 6; and see *Glover v. Black*, 3 Burr. 1394.

# ABBOTT ON SHIPPING.

## CHAPTER I.

## CHAP. I.

### OWNERS OF SHIPS IN GENERAL.

more persons may acquire the property of a *British* ship by Property in, it at their expense, or by purchasing it of another who has how ac-  
y to dispose of it, by sale pursuant to a decree of the Admi-quired.  
urt, or by capture and condemnation. Upon the death of  
er, his interest devolves upon his executors or administrators  
ersonal representatives; in the event of his bankruptcy or  
cy, it rests in his assignees. In the case of purchase, however,  
ecessary that the person who takes upon him to sell should  
wer to do so; for although a sale of other goods by the  
who is in possession of them does, in many cases, vest the  
in the buyer—even when the seller himself has neither  
in them nor authority to dispose of them—the same cannot  
ice with respect to ships,<sup>a</sup> as there is no *open market* for the  
them. Indeed, this species of property appears from very  
aces to have been evidenced by written documents—and at  
always is so—which other moveable goods rarely are—and  
e, the buyer has in this instance the means of ascertaining  
of any person who offers to sell, and can seldom be deceived  
y his own fault. The master of a ship too has, by virtue of  
loyment, not merely those powers which are necessary for  
igation of the ship, and the conduct of the adventure to a  
mination, but also a power, when such termination becomes  
y, and no prospect remains of bringing the vessel home, to do  
for all concerned, and therefore to dispose of her for their  
and most of the commercial codes of Europe confer upon  
powers.<sup>b</sup> It is a case of *necessity*, when nothing better can  
e for the benefit of the master's employers. When that  
y exists, a *sale* of the ship by the master is valid and binding.<sup>c</sup>  
hat necessity do not exist, although the master be himself a  
ner, yet will not his sale be good for more than his own part;  
interest of part-owners is so far distinct that one of them

Myer v. Pearson, 3 B. & C. 42.  
*Code de Commerce*, liv. 2, tit.  
or v. Parker, 7 M & W. 342;

Ireland v. Thomson, 4 C. B. 168; as  
to *bonâ fides*, see *Alcock v. R. Exch. Ass.*  
Co. 13 Q. B. 307, and *post*, *Master's*  
*authority*.

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**What passes on a sale of a ship.** The writers<sup>c</sup> on maritime law inform us, that if a ship be sold with the tackle, apparel, furniture, and other instruments thereto belonging—the ship's *boat* is not conveyed by these words, and they found their opinion upon the authority of those parts of the Digest in which it is said that the *boat* is not a part of the ship<sup>d</sup> or of its apparel.<sup>e</sup>

**Actual delivery when necessary.** It has been observed that the property of a ship is now always evidenced by written documents.<sup>f</sup> And these documents not only furnish the owner with proof of his property, but also enable him to dispose of it when the ship is at sea, or in a foreign port. When a ship is here in the country of its owner, and a delivery of *actual possession* is possible, such delivery seems necessary to give a perfect title to the buyer, in case of a sale of the whole ship; for, although, as between buyer and seller, the sale may be completed by a compliance with the provisions of the Registry Act, and payment of the price, without delivery of possession—yet, if the buyer suffer the seller to remain in possession and act as owner, and the seller in the meantime become bankrupt, the property, it seems, will be considered as remaining in him to be disposed of for the benefit of his creditors;<sup>g</sup> and sometimes, also, if an execution issues upon a judgment against the seller, the sale may be deemed fraudulent and void as against the party who has obtained the judgment.<sup>h</sup> But in case of a sale, or agreement for sale, of a *part* only, it has been thought sufficient if the vendor, having delivered the muniments of his title, ceased from the time to act as a part-owner, actual delivery of a part being said to be impossible.<sup>i</sup> This however should be understood with some limitation; for if a part-owner has the actual pos-

<sup>a</sup> See Valin on the French Ord. 1681, tom. 1, p. 444.

<sup>b</sup> See Reid v. Darby, 10 East, 143; Hunter v. Prinsep, Ib. 378; Hayman v. Molton, 5 Esp. 65.

<sup>c</sup> Roccus not. 20. Str. de Nav. p. 2, n. 12; Molloy de Jure, M. & N. b. 2, ch. 1, sec. 8. The latter adds that if a ship commit piracy the boat is not forfeited; and refers to a case in Roll's Ab. for his authority, and Beawes has followed the words of Molloy, but in the case referred to the boat is not mentioned.

<sup>d</sup> Dig. 21, 2, 44; Dig. 6, 3, 1.

<sup>e</sup> See 1 Hugg. 109.

<sup>f</sup> 8 & 9 Vict. c. 89, s. 34; 12 & 13 Vict. c. 29.

<sup>g</sup> 12 & 13 Vict. c. 106, s. 125, that is, the order and disposition clause of *The Bankrupt Law Consolidation Act*,

1849. It contains a proviso which saves a transfer or assignment of a ship, or any share thereof, made as a security for any debt by way of mortgage, or assignment, duly registered. A vessel at a builder's to be repaired would not pass to the assignees of the builder, under the order and disposition clause of the Bankrupt Act. And where a ship was in the process of building, and by piecemeal, so to speak, vested in A., it was held, that it did not pass to the builder's assignees, he having become bankrupt before the whole was completed. Woods v. Russell, 5 B. & A. 946; Clarke v. Spence, 4 Ad. & E. 465; Goss v. Quinton, 4 Sc. N. C. 482.

<sup>h</sup> See Twyne's Ca. 1 Smith's L. C. 1.

<sup>i</sup> Addis v. Baker, 1 Anst. 222; see also Gillespie v. Coutta, Amb. 652.

session of the ship, it is not impossible for him to deliver the possession: if he has not the actual possession, the possession of the other part-owners may reasonably be considered to be the possession of the vendee after the sale. Indeed, in the case of an absolute sale, it can rarely happen in practice that the seller should continue in possession: but the rule extends also to mortgages of this species of property, and with regard to them has been often actually enforced,<sup>a</sup> and may again be enforced, unless it can be brought within the *proviso* of the order and disposition clause of "The Bankrupt Consolidation Act, 1849," as already noticed. But when a ship was abroad, a perfect transfer of the property might *at the common law* have been made by assignment of the bill of sale, and delivery of that and the other documents relating to the ship,<sup>b</sup> as the delivery of the key of a warehouse to the buyer of goods contained therein, is held to change the property of the goods, according to the rule of the civil law;<sup>c</sup> such delivery in each case being not merely a symbol, but the mode of enabling the buyer to take actual possession, as soon as circumstances will permit. But the Legislature has declared, "that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of H. M.'s subjects, shall, *after registry* thereof, be sold to any other or others of H. M.'s subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or registry, or the principal contents thereof." Such bill of sale is declared to be of no force until produced to the officers of Customs, and duly entered.<sup>d</sup>

Another mode of acquiring property in a ship is by purchase, at a *Property* sale decreed by the Court of Admiralty; a power the Court has in all cases of bottomry, salvage, and claims for wages, if the demand of the successful suitor be not satisfied, a title conferred by the Court, in the exercise of this authority, is valid against all the *Admiralty* world.<sup>e</sup>

A third mode of acquiring property in a ship is by capture from an enemy in time of war, legalized and sanctioned *by a sentence of condemnation in a court of the capturing power, constituted according to the law of nations.*<sup>f</sup> But it is necessary to ask, in what form these adjudications constantly appeared? They are the sentences of courts acting and exercising functions in the belligerent country. In the year 1799, an attempt was made to impose upon the High Court of Admiralty a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a *neutral* country; but this sentence was declared illegal, and the ship was restored to the British owner, upon the

<sup>a</sup> *Stephen v. Sole*, cited in 1 Ves. Sen. 352, and in 1 Atk. 157; *Hall v. Gurney*, Co. B. L. ch. 8, s. 11.

<sup>b</sup> *Ex parte Matthews*, 2 Ves. Sen. 272; and *Atkinson v. Maling*, 2 T. R. 462; *ex parte Batson* Co. B. L. ch. 8, s. 11, and per *Kenyon Ch. J. arguendo* in *Gordon v. E. I. Co.* 7 T. R. 234; *vide*, *Irons*

*v. Smallpiece*, 2 B. & A. 551; *Langton v. Horton*, 1 Hare 549.

<sup>c</sup> Dig. 41, 1, 9, 6.

<sup>d</sup> 8 & 9 Vict. c. 89, s. 34, 37.

<sup>e</sup> *The Tremont*, 1 Wm. Rob. 164.

<sup>f</sup> *The Flad-Oyen*, 1 Rob. A. R. 135; *the Constant Mary*, 3 Rob. A. R. 97, n.



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usual salvage.\* As states in alliance with the captors, and at war with the country to which the ship belongs, are, for this purpose, deemed one community; a prize carried into such a state may be condemned there, or in the country of the captors.<sup>b</sup> If the capture is made by a ship belonging to H. M., the prize is formally condemned to the Queen, and the value distributed among the captors; and if the capture is by a private ship (in which case the sentence is in form a condemnation to the captors) a sale will always be the most convenient mode of ascertaining the value, both for the purpose of distribution among the captors, and of payment of the duties to the Queen;<sup>c</sup> and the Acts of Parliament which gave to prizes the privileges of British ships, presume a sale thereof, and provide regulations accordingly, as will appear in the next chapter. *Capture by pirates*, who are merely robbers at sea, does not divest the property of the owner;<sup>d</sup> and in a very early period of our history a law was made for the restitution of property so taken, if found within the realm, belonging as well to strangers as Englishmen.<sup>e</sup> But capture by an enemy in the exercise of war between two nations does, according to the law of nations, wholly divest the property of the owner, and transfer it to the captor or the sovereign of his State at the period named.

The subject of *restitution on recapture* will be mentioned in the chapter on *Salvage*.

On death,  
bankruptcy,  
&c.

The mode of acquiring property by act and operation of law, as upon death, bankruptcy, or insolvency, of the owner, may be passed over for the present, with the remark, that the Registry Act does not apply to it.

Mortgage.

It seems proper in this place to take notice of the question, whether the *mortgagee* of a ship is to be deemed in law the owner of it, entitled to the benefits, and liable to the burdens which belong to that character, before he takes possession of the ship. Since the Registry Acts, a mortgagee, as owner, is entitled to accruing freight and other benefits;<sup>f</sup> but his liability for repairs and the like arises from a source distinct and different from legal ownership.<sup>g</sup> Title, it is true, is not to be disregarded,<sup>h</sup> but upon whose credit were the repairs done is the question. The object of the Registry Acts was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were formerly thought liable.<sup>i</sup> What is the precise character of the respective interests of mortgagor and mortgagee under the Registry Acts, is no easy matter to determine. The mortgagor does not cease to be owner, except so far as may be necessary for the purpose of rendering the ship or shares available by sale or otherwise; and the mortgagee is not to be

\* The Flad-Oyen, reported in *Havelock v. Rockwood*, 8 T. R. 270, n.; the *Heinrick and Maria*, 6 Rob. A. R. 138.

<sup>b</sup> *Oddy v. Bovill*, 2 East, 479; *Donaldson v. Thompson*, 1 Camp. 429.

<sup>c</sup> By 34 Geo. 3, c. 70, ships of war, whether public or private, captured and made prize were exempt from duty.

<sup>d</sup> 27 Edw. 3. st. 2, c. 13; Y. Bk. 2 Rich. 3, 2; Jenkin's cent. p. 165.

<sup>e</sup> *Cato v. Irving*, 21 L. J. Ch. 675.

<sup>f</sup> *Briggs v. Wilkinson*, 7 B. & C. 30; *Curling v. Robertson*, 8 Scott's N. C. 12.

<sup>g</sup> *Frost v. Oliver*, 2 E. & B. 301.

<sup>h</sup> *Dean v. McGhie*, 4 Bing. 45; *Kerrill v. Bishop*, 2 Cr. & J. 529.

deemed the true owner ; yet the latter acquires an insurable interest commensurate in value with the amount of his debt.<sup>a</sup> CHAP. I.

In this chapter it is proper also to mention another point upon which different judgments have been pronounced ; viz., who, in the case of a ship chartered to one person is to be considered as owner with respect to another person whose goods have been shipped under the authority of the charterer. This is also a question of fact. If it appears to be the object and intention of all the parties (on examining the charter-party, and taking into consideration the nature of the ship, the voyage, and circumstances of the case), that the exclusive possession of the ship was to pass to the hirer, then he (the charterer) is owner for the time ; on the other hand, if it appears that the general control of the owners was not to be interfered with by the charter-party, in that case the owners are liable. There are remarks scattered here and there in our Reports, suggesting that both owner and charterer may be considered owners at one and the same time. Be that as it may, it is clear that the charterer is not liable as owner, unless the exclusive possession of the vessel passed to him as above described.<sup>b</sup> Who owner when chartered.

## CHAPTER II.

### PROPERTY IN BRITISH SHIPS.

ALL commercial nations have, for the advancement of their individual prosperity, conferred various privileges of trade upon the ships belonging to their own countrymen ; and the legislature of this nation has for the same purpose, at different periods, enacted laws suitable to the circumstances of the times, requiring for the exercise of some particular branches of commerce, ships not only of the property of its own subjects but also of the build of its own dominions ;<sup>c</sup> allowing other branches to ships the property only of its own subjects without regard to the build ; and in others, in which foreign ships were suffered to participate, favouring those of its own subjects by a difference in the rate of duties. It has, however, at all times been the policy of the legislature to confine the privileges of our trade, as far as was consistent with the extent of it, to ships built within our dominions ; for instance, the coasting trade of the U. K. and Isle of Man : all trade with the Channel Islands : and the coasting trade of the British possessions abroad is confined to *British* ships.<sup>d</sup> The *Consolidation-Register Act*<sup>e</sup> also declares that " no ship

General policy of commercial nations.

<sup>a</sup> Irving v. Richardson, 2 B. & Ad. 198.

<sup>b</sup> Fenton v. City of Dublin, S. P. Co. 8 Ad. & E. 843.

<sup>c</sup> 12 & 13 Vict. c. 29 (Navigation Act) ; 8 & 9 Vict. c. 89 (Registry Act.)

<sup>d</sup> 12 & 13 Vict. c. 29, s. 2. But there is now (1854) a Bill before Parliament to throw open our coasting trade to foreigners.

<sup>e</sup> 8 & 9 Vict. c. 89.

*Abbott on Shipping.*  
Ship Registry Act.

What constitutes a British vessel.

Others forfeited if so used.

or vessel shall be registered, or having been registered, shall be deemed to be duly registered by virtue of that act, except such as are wholly of the build of the *U. K.*, or of the *Isle of Man*, or of the islands of *Guernsey* or *Jersey*, or of some of the *Colonies*, plantations, islands, or territories, in *Asia*, *Africa*, or *America*, or of *Malta*, *Gibraltar*, or *Heligoland*, which belonged to H. M., her heirs, or successors, at the time of the building of such ships or vessels, or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships or vessels as shall have been condemned in any competent court, as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong, and continue wholly to belong to H. M.'s subjects, duly entitled to be owners of ships or vessels registered by virtue of that Act. And *The Navigation Act*<sup>a</sup> declares that no ship shall be *admitted to be a British ship, unless duly registered and navigated as such*; that is, navigated by a master who is a *British* subject, and by a crew of a defined proportion of *British* subjects. But by the 16 and 17 Vict. c. 131, s. 31, the 12 and 13 Vict. c. 29, as to *manning*, is repealed. British-built boats or vessels, which are under 15 tons burden,<sup>a</sup> wholly owned by British subjects, although they be not registered as British ships, are admitted to be British vessels in all navigation on the rivers, upon the coasts of the *U. K.*, or of the British possessions abroad, and not proceeding over sea, except within the limits of the respective colonial governments, within which the managing owners thereof reside.<sup>b</sup> And British-built boats or vessels wholly owned by British subjects, not exceeding 30 tons, and not having a whole or fixed deck, and being employed solely in fishing on the banks and shores of *Newfoundland*, and of the parts adjacent, or on the banks and shores of the provinces of *Canada*, *Nova Scotia*, or *New Brunswick*, adjacent to the *Gulf of St. Lawrence*, or on the north of *Cape Corso*, or of the islands within the same, or in trading coastwise within the same limits, which need not be registered so long as such boats or vessels shall be solely so employed. Again, ships built in the British settlements at *Honduras*, and owned as British, are entitled to all the privileges of registered vessels in all direct trade between the *U. K.* or the British property in *America* and the said settlements, provided the master produce the proper certificate, with the required indorsement, the ship is entitled to any of the privileges of a *British* registered ship, unless the person claiming property therein shall have caused her to be duly registered, and shall have obtained a certificate of such registry. And if any ship, not being duly registered, and not having obtained a certificate, shall exercise any of the privileges of a *British* ship, she shall, with all her guns, furniture, ammunition, tackle and apparel, be subject to forfeiture, and may be seized by any custom-house officer. Vessels duly registered under acts previous to the 8 and 9 Vict. are not affected by it in this respect. Again, no ship shall continue to enjoy the privileges of a *British* ship, 1stly, after the same shall have been repaired in a

<sup>a</sup> 12 & 13 Vict. c. 29, s. 7.

<sup>b</sup> *Id.*

foreign country if such repairs exceed 20*s.* *per ton* of her burden, CHAP. II.  
 unless such repairs shall have been made necessary by reason of extraordinary damages sustained abroad to enable her to perform her voyage, and to return to some port in H. M.'s dominions, which repairs her commander, on the first entry, must, under a penalty, report to the Collector and Comptroller of Customs at such port, and there, if the Commissioners are satisfied by proof that she was seaworthy at the time when she last departed from any port in H. M.'s dominions, How coming to have the privileges of a British ship.  
 and that no greater quantity of repairs has been done to her than necessary, they will order the Collector to certify these facts on the certificate of registry. 2ndly. Nor after being declared stranded or unseaworthy, and incapable of being recovered or repaired to the advantage of the owners thereof, and for such reasons sold by order or decree of any competent court for the benefit of the owners or other person interested therein. 3rdly. Nor after being captured by, and become prize to an enemy, or sold to foreigners, except ships condemned in any Court of Admiralty as prize of war, or in any competent court for breach of the slave-trade laws. Place of registry.  
 The place of registry and certificate is the place to which such ship shall properly belong, that is the port at or near to which some or one of the owners, who shall make and subscribe the declaration required by the 12 and 13 Vict. c. 29, before registry be made, shall reside, unless the Commrs. of Customs, by an order in writing, specially sanction a register elsewhere. Vessels, however, condemned as prize or forfeiture in *Guernsey*, *Jersey*, or *Man*, are not to be registered there, but at *Southampton*, *Weymouth*, *Exeter*, *Plymouth*, *Falmouth*, *Liverpool*, or *Whitehaven*. To obtain these the collector and How ob-  
 Comptroller of Customs must have a certificate of survey, and tained  
 builder's certificate of her particulars; if from death or unavoidable circumstances such certificate cannot be produced, proof will suffice. The declaration which is set out in 12 and 13 Vict. c. 29, s. 19, is to Declaration of owners.  
 be made by the owner if only one; if there be two, and both reside within 20 miles of the port of registry, by both; if both or either reside at a greater distance, by one only; if there be more than two owners, by the greater part; if the greater part reside within 20 miles, not in any case exceeding three, unless a greater number shall be desirous to join in making and subscribing the said declaration; or by one, if all, or all except one, shall reside at a greater distance. In the case of a ship belonging to any *corporate body* in the U. K., another form of declaration is directed to be taken and subscribed by the secretary or other proper officer of such corporate body. At the time the certificate <sup>a</sup> is obtained, a *bond* is Certificate of registry.  
 given to the crown conditioned to deliver it up if the ship be lost or the master be changed, and the like. The certificates thus granted are to be numbered in progression by the persons granting them, beginning such numeration at the commencement of each and every year, and the collector must copy into a book, to be kept for that purpose, all the particulars contained in them; and forthwith, or within one month at the farthest, transmit exact copies to the Commrs. of the

<sup>a</sup> Form of in 12 & 13 Vict. c. 29, s. 18.

*Abbott on Shipping.* Customs, together with the number of such certificate granted by them.

Transfer of property in. These several regulations are applicable to *British* ships while they remain the property of their original owners. Other provisions are made by the statutes to regulate the transfer of the property, wholly or in part, from one person to another; and as no transfer can be valid without a compliance with them,<sup>a</sup> I will now proceed to the consideration of them. In the first place, it must be premised that the property of every *British* ship, of which there are more than one owner, must be taken and considered to be divided into 64 equal parts or shares; and the proportion held by each described in the registry as being a certain number of 64th parts, of shares; and that no person can register in respect of any proportion which is not an integral 64th of the same; except when the property is incapable of being reduced by division into any number of integral 64ths; and, except also, when it is partnership-property, in that case, the partners may hold the property, in the name of the house, without distinguishing the interest of each owner, and the ship or shares are to be subject to the rules of law and equity that govern other partnership property. Again, no greater number than 30 persons can be *legal* owners at one and the same time as tenants in common, or can be registered as such. In this respect, however, it is provided that this rule shall not effect the *equitable* title of minors, heirs, legatees, creditors, or others, exceeding that number, represented by, or holding from, any of the persons within the said number registered as legal owners of any share or shares, nor joint-stock companies who may, by the permission of the Commrs. of Customs, hold ships through the intervention of not less than three trustees.

Number of shares.

Effects of entry, and priority of indorsement.

The *transfer* is thus effected:—When the property in any ship, or any part thereof, belonging to any of H. M.'s subjects, shall, *after registry* thereof, be *sold* to any other of H. M.'s subjects, the same shall be transferred by *bill of sale, or other instrument in writing, containing a recital of the certificate of registry* of such ship, or the principal contents thereof; otherwise such *transfer* shall not be valid or effectual for any purposes whatever either in law or in equity.<sup>b</sup> The *bill of sale* is not to be deemed *void by reason of any error in such recital*, or by the recital of any former certificate of registry, instead of the existing certificate, *provided the identity of the ship or vessel, intended in the recital, be effectually proved thereby*. Mark, the bill of sale, or other instrument in writing, is not valid for any purpose *until* it is produced to the Collector and Comptroller of the

<sup>a</sup> See *Kain v. Old*, 2 B. & C. 627; *Speldt v. Lechmere*, 13 Ves. 589; *The Ship-Registry Act* (8 & 9 Vict. c. 89) does not apply to a transfer by act and operation of law, see *Bloxam v. Hubbard*, 5 East, 407. So far as it tends to defeat a title it must be constructed with the strictness of a *penal* enactment, *Hubbard v. Johnstone*, 3 Taunt, 177.

As to *executory* contracts for sale of a ship after registry, see *Hughes v. Morris*, 21 L. J. Ch. 761; *Duncan v. Tindal*, 22 Ib. C. B. 137; *McCalmont v. Rankin*, Ib. ch. 554.

<sup>b</sup> *Hughes v. Morris*, 21 L. J. Ch. 761; *McCalmont v. Rankin*, 22 Ib. 554; *Duncan v. Tindal*, Ib. C. P. 137.

port at which such ship is already registered,<sup>a</sup> or both Collector or Comptroller at any other port at which she is about to be registered *de novo* (as the case may be); nor until there be entered in the book of registry, or registry *de novo*, the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it. Moreover (except when the ship is about to be registered *de novo*, in which case a new certificate is granted), the Collector and Comptroller of the port, where such ship is registered, must indorse these particulars on the certificate. The Collector and Comptroller must also forthwith give notice thereof to the Commrs. of Customs, and, if required, must certify, by indorsement on the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry. When done, the bill of sale or other instrument is valid to all intents and purposes, and as against all persons whatever, except as against *such subsequent purchasers and mortgagees, who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel, in manner hereinafter mentioned.* The intent and meaning of the act is declared to be (as between purchasers and mortgagees, where more than one appears to claim the same property, or to claim security on the same property, in the same rank and degree), that priority one over the other should be allowed, not according to the respective times when the *entry* is made in the book of registry, but according to the time when the *indorsement* is made upon the certificate of registry. To illustrate it; suppose A. execute two bills of sale of one and the same share, that is, one to B. and another to C.; and B. enter his bill of sale in the book of registry, by which his title is perfect, subject to be divested by his non-compliance with the requirements of the Act: C. afterwards enters his, gets possession of the certificate, and first procures the *indorsement* to be made upon it, the property is in C., and not in B., though C. was, in fact, the subsequent purchaser. But suppose the certificate were lost, mislaid, or detained? in such case, the Commrs. of Customs may grant further time; and their Collector will make a memorandum of it in the book of registry; and, during such time, no priority can be gained. When a bill of sale, or other instrument in writing, has been so entered for any share, 30 days are allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered; or if the ship is absent from the port to which she belongs, at the time of such entry, then 30 days must elapse from the day of her arrival at her port; and so, if two or more were entered, as regards others, and in every case where there shall at any time happen to be two or more transfers of the same owner, or of the same property, entered in the book of registry, the Collector and Comptroller must indorse upon the certificate of registry the par-

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<sup>a</sup> *Boyson v. Gibson*, 4 C. B. 148.<sup>b</sup> 8 & 9 Vict. c. 89, ss. 35, 36.

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particulars of the bill of sale, or other instrument, under which the person claims property, who shall produce the certificate of registry for that purpose within 30 days next after the entry of his said bill of sale, or other instrument, in the book of registry, or within 30 days next after the return of the ship to her port, in case of her absence at the time of such entry, and in case no person shall produce the certificate of registry *within the said spaces* of 30 days, they must indorse upon the certificate of registry the particulars, &c., to such persons as shall first produce the certificate of registry for that purpose. By way of further illustration:—suppose A. to execute a bill of sale to B., and another to C., and B.'s instrument is duly entered on the 1st of Jan.; 30 days, from that day, must elapse before C.'s instrument can be entered, or, if the ship were absent, 30 days must elapse from the day of her arrival at her port before C.'s can be entered. Supposing both B. and C.'s instruments entered, the same number of days must elapse before a third can be entered, and so on: suppose both B. and C.'s instruments entered, but B. neglects, within the time allowed him, to obtain the required indorsement on the certificate, C.'s 30 days then begin to run, and if he, within the time, procure the indorsement, C. has priority over B.; but if C. neglect, in like manner, he who first produces the certificate, and procures the indorsement, has the legal title to the share.\* It should be further observed, that if, after being recorded at the port to which the ship belongs, the certificate of registry and bill of sale, containing a notification of such record, be produced to the Collector and Comptroller of *any port where she may then be*, they, on being required so to do, must indorse on the certificate the transfer mentioned in such bill of sale; and give notice thereof to the Collector and Comptroller of the port to which she belongs, who shall receive the same, as if they had made such indorsement themselves; but inserting the name of the port at which such indorsement was made. Previous notice of such requisition, however, must first be given to the officers of the port to which she belongs, who are to send information to the officers of such other port, whether any, and what other, bill or bills of sale have been recorded in the books of registry, and the officers of such other port, having such information, must proceed to the indorsing of the certificate, just as they would do if such other port were the port to which such vessel belonged. Again, if, upon registry *de novo*, any bill of sale shall not have been recorded and indorsed, as above stated, the bill of sale must be produced and registered; otherwise, such sale shall not be noticed in the registry *de novo*; provided always, that upon the future production of the bill of sale and certificate, the transfer may be recorded, as well after such registry *de novo*, as before. Again, it should be observed, that upon any change of property in a ship, registry *de novo* may be granted (if desired), although not required by the act. If the property of any one who may be out of the kingdom be sold, in his absence, by his kinsman, agent, or correspondent, under his directions, express or implied, and acting for his

Transfer by  
agent.

\* See Smith's Merc. L. 171 (3rd Edit.)

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nent in that behalf, without legal power, the Commrs. of Customs may, upon application to them, and proof to their satisfaction of the fair dealings of the parties, permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, in manner directed by the act, as if such legal power had been produced. And if a bill of sale cannot be produced, or if, by reason of time, absence, or death of parties concerned, it cannot be proved that a bill of sale had been executed, and registry *de novo* shall have become necessary, the Commrs., upon proof of the fair dealings of the parties, may permit the ship to be registered *de novo*, as if a bill of sale had been produced; provided good and *sufficient security* be given to produce legal powers, or abide future claims.

These observations apply to *absolute* transfers; but there is another which, from frequent occurrence and great practical importance, requires consideration, namely, transfer by way of legacy, mortgage, or assignment to trustees for the payment of debts. In these cases, the Collector and Comptroller of the port where she is registered must, in the entry book of registry, state and express the nature and object of the transfer. The mortgagee is not by reason thereof to be deemed the owner; and his interest being duly registered, is not to be affected by any act of bankruptcy of the mortgagor.

Transfers by way of mortgage, &c.

No person who has taken the oath of allegiance to any foreign state (except under the terms of some capitulation), unless afterwards denizenised or naturalised, nor any person usually residing in a foreign country (unless he be a member of some *British* factory, or agent for or partner in any house actually carrying on trade in *Great Britain* or *Ireland*) can be owner, in whole or in part, directly or indirectly, of any ship required to be registered; save and except, also, a member of the company of merchants trading to the *Levant Seas* at the time of its dissolution, and continuing to hold any shares. An occasional residence for the purpose of obtaining a colourable qualification will not give a title. No person is entitled who has not his usual residence in *Gt. Britain*, or in the dominions belonging to the crown. If he go to another country, and there has a more usual residence than in this, he is no longer entitled to the same privilege. Besides, *The Merchant Shipping Law Amendment Act* (16 & 17 Vict. c. 131, s. 32) requires a declaration to be made by the transferee of any share in any British registered ship that he is a *British* subject, unless she be thereupon registered *de novo*, and that no foreigner has any interest in the share transferred; and that no bill of sale shall be registered, unless such declaration be indorsed and signed. The 8 & 9 Vict. c. 89, requires the officers to make a registry *de novo*, and to grant a new certificate: when the old certificate has been lost or mislaid; when the certificate is *wilfully* detained, or the person detaining it has absconded; whenever the owner who subscribed the declaration has transferred all his shares; when the ship is altered, so as not to correspond with the particulars in her certificate. Add to this, that the owners *may*, if they think fit, on any change of property, have the vessel registered *de novo*. In some of these cases it is optional with the owners to register anew or not; in others, it is absolutely necessary, as, without it, she is deemed and taken to be a

Who cannot be an owner.

Declaration by purchaser.

Registry *de novo*.



Abbott on Shipping. ship not duly registered. Instead, however, of a registry *de novo*, a temporary licence may be obtained, in some cases, as when the certificate is unlawfully detained, or lost, or mislaid.

The officers may be compelled by *mandamus* to do their duty.

**Sale before registry.** A bill of sale from the original builder to the first purchasers of a new ship, that is, of a ship before registry, need not contain a recital of a certificate of registry: <sup>a</sup> nor can properly do so, because regularly the ship is not to be registered until it comes to their hands, although they must cause it to be registered before the commencement of a voyage.<sup>b</sup>

**Detaining certificate.** If the master, though part-owner, or if any other person who shall have received or obtained by any means, or for any purpose whatever, a certificate of registry, shall *wilfully* <sup>c</sup> detain or refuse to deliver it up to the proper officers of the customs, for the purposes of the ship, any neighbouring justice of the peace may, upon the complaint or oath of any owner, fine the offender 100*l.*; and on default of payment, commit him to gaol for not less than 3 or more than 12 months. Independent of those provisions, where the Court of Admiralty entertains a suit for the possession of a ship, that Court will, if necessary, compel the production of it by its own process. In a suit on a bottomry bond, such process was issued against a person who detained the register under an alleged sale by the original owner, but which seems to have been considered as a fraudulent sale, made for the purpose of defeating the bond. This person returned to the process that the certificate had been deposited in the hands of another; a similar process was then issued to the other, and the certificate was delivered up.<sup>d</sup>

**Inspection, &c.** The officers of the customs at any port or place must, upon reasonable request by any person whatever, produce and exhibit for his inspection all instruments, entries, &c., thus required to be made, and must allow him to extract or copy them.

**Evidence.** All examined copies are evidence of the facts they contain, or, by the Law of Evidence Act, a certified copy will in general suffice.<sup>e</sup>

<sup>a</sup> *Oxenham v. Gibbs*, in B. R. Tr. T. 1807.

<sup>b</sup> As to contracts for *building* a ship, see *Woods v. Russell*, 5 B. & A. 942; *Clarke v. Spence*, 4 Ad. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Read v. Fairbanks*, 22 L. J. C. B. 206. A contract or agreement for sale of a ship

after registry must recite the certificate, *McCalmont v. Rankin*, *ante*, p. 122, e.

<sup>c</sup> See *Bowen v. Fox*, 10 B. & C. 41; *Rex v. Walsh*, 1 Ad. & E. 481.

<sup>d</sup> *The Barbara*, 4 Rob. A. R. 1.

<sup>e</sup> 8 & 9 Vict. c. 89, s. 43. 14 & 15 Vict. c. 99, s. 5.

## CHAPTER III.

## CHAP. III.

## PART-OWNERS.

several part-owners of a ship are *tenants in common* with each other of their respective shares :<sup>a</sup> each has a distinct, although undivided, interest in the whole, and upon the death of any one, his share goes to his own personal representatives, and does not accrue to the others by survivorship.<sup>b</sup> It is proposed to consider the nature of this interest, 1, with relation to each other; and, 2, with relation to creditors.

A personal chattel, vested in several distinct proprietors, cannot jointly be enjoyed advantageously by all, without a common consent or agreement among them. To regulate their enjoyment, in case of disagreement, is one of the hardest tasks of legislation : and it is without wisdom that the law of England, in general, declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain undivided or perish by their dissension ; as the best method of forcing them to a common consent for their common benefit. But of ships, which are built to plough the sea, and not to lie by the walls, mercantile nations consider the actual employment as a matter, not merely of private advantage to their owners, but of public interest to the State, and therefore have laid down certain positive rules in order to favour this employment, and to prevent the obstinacy of some of the part-owners from condemning the ship to rot in harbour. It sometimes happens, that several persons become partners in a ship under a fixed compact and settled agreement among them for the employment of it, or that by common consent they entrust the management of their common concern to one of them, who by a very intelligible figure of speech is called the *husband* of the ship. When this is the case, nothing is left for the law of the State but to enforce the compact and agreement of the parties according to its own mode of administering justice in analogous cases. It is only, when the enjoyment of the property has not been settled by the parties, that it becomes necessary to inquire what the law of the country has prescribed for the regulation of it. The foreign writers<sup>c</sup> on maritime law have laid it down as a rule, that if a ship is in need of repair, and one part-owner is willing to repair it, and another unwilling, he, who is willing, may repair it at the common expense ; and if the other will not pay his quota within a certain time, he shall lose his share in the ship : and they found their principle upon a passage in the Digest, in which the same opinion is given with regard to the repairs of a house.<sup>d</sup> But I do not find

Tenants in common.

Employment of ship, how regulated.

<sup>a</sup> 8 & 9 Vict. c. 89, s. 35.

<sup>b</sup> See Smith's Merc. Law, b. 2, ch. 1. where they *joint-tenants* the property does not pass to the survivor; for the law of partnership chattels does not sur-

vive at law. See Buckley v. Barber, 6 Exch. 180.

<sup>c</sup> Strocce de Nav. p. 2, n. 8.

<sup>d</sup> Dig. 17, 2, 52, 10.

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How minority may obtain security.

How majority may change possession.

this rule adopted in practice in any country, and in case of the poverty of the party it would be extremely cruel. The law of this country while it authorizes the *majority in value* to employ the ship upon probable design, it takes care to secure the interest of the dissenting minority from being lost in the employment of which they disprove. And for this purpose it has been the practice of the Court of Admiralty from very remote times to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship within a limited time, or to pay them the value of their shares. When this is done, the dissenting part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking, but the sailors wholly at the charge and risk, and for the profit of the other part-owners. This security may be taken upon a warrant obtained by the minority to arrest the ship; and it is incumbent on the minority to have recourse to such proceedings, as the best means of protecting their interest; or if they forbear to do so, at all events they should expressly notify their dissent to the others, and, if possible, to the merchants also, who freight the ship. For it has been decided, that one part-owner cannot recover damages against another by an action at law upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost.<sup>b</sup> And it has also been decided in the Court of Chancery that one part-owner cannot have redress in equity against another for the loss of a ship sent to sea without his assent. These decisions are consonant to the general rule of law, that when one tenant in common does not destroy the common property, he only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by his companion. And in a case tried before Ch. J. King, wherein it appeared that one part-owner had forced out of the possession of another, secreted it, and changed its name: and that it afterwards came into the possession of a third person, who sent it to sea, where it was sunk and lost; Ch. J. left it to the jury to say, under all the circumstances of the case, whether this was not a destruction of the ship by the means of the defendant; and they finding it to be so, the plaintiff recovered the value of his share. The Court of C. P. afterwards approved of this direction.<sup>d</sup> If a part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss.<sup>e</sup> If a minority happen to have possession of the ship, and refuse to employ it, the majority also may, by a similar warrant, obtain possession of it, and send it to sea, upon giving such security. The Court of Admiralty can never proceed to change the possession, except on the application of a *majority* of the whole of the *legal* interest.<sup>f</sup> It was indeed formerly doubted in Westminster Hall, whether this practice

<sup>a</sup> Anon. 2 Ch. Ca. 36; *Boson v. Sandford*, Carth. 58.

<sup>b</sup> *Graves v. Sawcer*, Sir T. Ray. 15.

<sup>c</sup> *Strelly v. Winson*, 1 Vern. 297.

<sup>d</sup> *Barnardiston v. Chapman*, cited in

*Heath v. Hubbard*, 4 East, 120.

<sup>e</sup> *Horn v. Gilpin*, Amb. 255.

<sup>f</sup> *The Valiant*, 1 Wm. Rob. the Elizabeth and Jane, Ib. 279.

of the Court of Admiralty was not an unfounded assumption of jurisdiction in a matter not within its cognizance, because arising at home and upon land; but it is now universally admitted—an admitted jurisdiction, not only to detain the vessel at the instance of one part-owner, until the others give security to the extent of their shares, but in a suit instituted by the real owner against a mere wrong-doer.<sup>a</sup> The Court, as above stated, regards the *legal* title only, and in case of dispute, will direct a feigned issue. A mortgagee cannot obtain this warrant.<sup>b</sup>

The Court of Admiralty cannot in *any case* compel any of the part-owners to *sell* his interest.<sup>c</sup>

The interest of part-owners in a ship and in the profits and loss of an adventure undertaken by their mutual consent, is not affected by the *bankruptcy* of one of them taking place after the commencement of the voyage, although he has not paid his full share of the outfit. In such a case if the other part-owners have in that character paid the expense of the outfit, or made themselves responsible for it, they will have a right to *deduct* his share from the portion of the profits to be paid to his assignees; for, as a general rule, if one partner become bankrupt, his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership. So in a joint shipping adventure, which produces certain goods, no partner nor any representative of one, has a right to his aliquot part of such goods, until he has paid his share of the expense of procuring it. But this *lien* seems confined to the profits of the adventure, and not to extend to the bankrupt's share in the ship itself.<sup>d</sup> The proper course is (bankruptcy or no bankruptcy) first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled.<sup>e</sup> So the usage or course of trade I apprehend to be to charge an assignee or purchaser in account for the outfit and other expenses incurred in respect of the voyage, of which he is entitled, in consequence of his purchase to share the profits, which can be only the voyage in prosecution at the time of the purchase, but not to carry back the charge as against him to the expense of any antecedent adventure from which he can derive no profit. It is said to have been decided in the Court of Chancery in a case where the majority of the part-owners had settled an account of the profits of a voyage that the others were concluded thereby; and the court would not entertain a suit by one of them to unravel the accounts.<sup>f</sup> I presume this to have been a settlement with the master. The ordinary remedy for part-owners to obtain an adjustment of the ship's accounts among themselves is a suit in a Court of Equity. The only proceeding at the common law generally applicable to their case is an *action of account*, and this proceeding has

<sup>a</sup> In re Blanshard, 2 B. & C. 249.

<sup>b</sup> The Highlander, 2 Wm. Rob. 109.

<sup>c</sup> Ouston v. Hebden, 1 Wils. 101, see also *ex parte* Young, 2 Ves. & B. 242.

<sup>d</sup> *Ex parte* Young, 2 Ves. & B. 242.

*ex parte* Harrison, 2 Rose, 76; *contra*, Doddington v. Hallett, 1 Ves. Sen. 497.

<sup>e</sup> Smith v. De Silva, Cowp. 469; Holderness v. Shackels, 8 B. & C. 612.

<sup>f</sup> Robinson v. Thompson, 1 Vern. 465.

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ong fallen into disuse. But in a case where several part-owners entered into a written agreement, whereby they and each and every of them did agree to and with the others and each and every of the others, that the ship should proceed on a certain voyage, and be under the exclusive management and control of one of the parties as husband thereof;<sup>a</sup> and that after the ship's return a full account should be made out of the ship and her concerns, and the nett profits be divided according to the proportions; it was held that each individual party to the agreement might maintain an action at law upon it against him who had acted as the husband, for not making out an account and dividing the profits within a reasonable time after the ship's return.

Parties to  
actions.

2. *As to the interest of part-owners with regard to strangers.*—The several part-owners of a ship make in law but one owner, and in all actions, whether of contract or loss, ought regularly to join in one action at law for the recovery of the debt or damages which are afterwards to be divided among themselves according to their respective interests; for otherwise the party complained of might be unnecessarily harassed with the expense of several suits to obtain the same end which might be as well effected in one. It is true that the non-joinder of a part-owner as co-plaintiff may, under "The Common Law Procedure Act," 1852, be amended before or at the trial in some cases; but as the defendant may still plead in abatement, and as the amendment is upon terms sometimes severe, all should be joined in the first instance.<sup>b</sup> The defendant should take care to have this righted, for if the defendant does not do this the single part-owner will recover damages for the injury proportionate to his share in the ship, whether the nature of his interest is made to appear upon evidence at the trial or is originally stated by himself in the allegation of his cause of complaint. And if afterwards another part-owner sues for his own interest, the defendant can no longer avail himself of the objection, because the party to the first suit has no longer any matter of complaint.<sup>c</sup> In the case of the death of any part-owner after an injury received, the right of action survives in general to the surviving part-owners, who must afterwards pay to the personal representatives of the deceased the value of his share. The same remarks apply to the nonjoinder of a part-owner as co-defendant.<sup>d</sup> And it is no less important for the defendant to have it set right; for otherwise, the plaintiff will recover his whole demand, and the defendant will be obliged to resort to the others for contribution.

<sup>a</sup> *Owston v. Ogle*, 13 East, 538; *Servante v. James*, 10 B. & C. 413; *Eccleston v. Clipsham*, 1 Wms. Saund. 153.

<sup>b</sup> 15 & 16 Vict. c. 76, ss. 34—36.

<sup>c</sup> *Sedgworth v. Overend*, 7 T. R. 279; *Cooper v. South*, 4 Taunt. 802; 2 Wms. Saund. 117, a.

<sup>d</sup> 15 & 16 Vict. c. 76, ss. 37—39.

## THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

### CHAPTER IV.

### CHAP. IV.

#### THE QUALIFICATIONS OF THE MASTER AND MARINERS.

THE master of a ship is the person entrusted with the care and management of it. His power and authority are so great, and the trust reposed in him is of so important a nature, that the greatest care and circumspection ought to be used by the owners in the choice and appointment of him. It appears, by the language of the ancient sea-laws and ordinances, that the master was formerly, in almost every instance, a part-owner of the ship, and consequently interested in a twofold character in the faithful discharge of his duty. At present, frequently happens that he has no property in the ship.

The law of this country requires a previous *examination* of the person to be appointed to this important office, in order to ascertain his fitness for it.<sup>a</sup> It requires this of both the *master* and *mate* of *foreign going ships*, that is to say, of all ships employed in trading or going beyond the following limits, namely, the coasts of the *U. K.*, the islands of *Guernsey*, *Jersey*, *Sark*, *Alderney*, and *Man*, and the continent of *Europe*, between the river *Elbe* and *Brest*, inclusive. This examination is conducted by local Marine Boards, under the general superintendence of the Board of Trade. Upon a satisfactory report of the local examiners, the Board of Trade grants the applicant *certificate of competency* or a *certificate of service*, as the case may be. The Board of Trade has also the wholesome and necessary powers of suspending or cancelling such certificates, in case of need.<sup>b</sup> The certificates may be either of a grade appropriate to the stations held by them for the time being, or of any superior grade.<sup>c</sup> All certificates, whether of competency or service, must be made in duplicate, one part of which is to be delivered to the person entitled to the certificate, and the other kept and recorded by the registrar of seamen, or by such other person as the Board of Trade may direct, who is, upon notice from the Board, to make a corresponding entry in the record of Certificates of all orders made by it for cancelling, suspending, altering, or otherwise affecting any certificate.<sup>d</sup> If a master or mate can prove to the satisfaction of the Board of Trade that he has innocently lost or been deprived of any certificate already granted to him, a copy is to be made and certified and delivered to him, which copy is to have all the effect of an original.<sup>d</sup> On signing the *ship's articles*, or in the case of running agreements, before the second and every subsequent voyage, the certificates must be produced to the *shipping*

<sup>a</sup> The *Mercantile Marine Act*, 1850 & 15 Vict. c. 96, ss. 4, 26).  
(13 & 14 Vict. c. 93, ss. 24—26).

<sup>c</sup> *Ib.* s. 5.

<sup>b</sup> *Ib.* s. 28, enlarged by the *Mercantile Marine Amendment Act*, 1851 (14

<sup>d</sup> 13 & 14 Vict. c. 93, ss. 29, 30.

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Seamen.

Local  
boards may  
establish  
and regulate  
shipping  
offices.

Business of  
such offices  
generally.

master, who signs and gives a certificate to that effect. The Collector or Comptroller of the customs may, upon the production of this certificate, allow such ship to go to sea without requiring the production of the certificates or ship's articles. No officer is allowed to clear any such ship without the production of this shipping master's certificate.<sup>a</sup> False representations for the purpose of obtaining; the forging, altering, fraudulently using; neglecting to give up any certificate of competency or service when cancelled, are grave offences and severely punished by fine or imprisonment. The other persons employed in the ordinary navigation of a trading ship fall under the general denomination of mariners or *seamen*. For the employment of a British ship it was formerly necessary that the master and a certain proportion of the mariners should, in many cases, be British subjects; but this is not so now.<sup>b</sup>

*The Mercantile Marine Act, 1850* (13 & 14 Vict., c. 93), contains most important provisions relating to *seamen*. It is entitled "An Act for improving the condition of Masters, Mates, and Seamen, and maintaining discipline in the Merchant Service." Under the word *seaman* the Act includes every person (except masters and apprentices, duly indentured and registered) employed or engaged to serve in any capacity on board any sea-going vessel. After vesting all powers of controlling and regulating *The General Register and Record Office of Seamen* in the Board of Trade, and giving it power, with the concurrence of the Lord High Admiral or Commissioners, to dispense with so much of *The General Merchant Seamen's Act* (7 & 8 Vict., c. 112) as relates to *register tickets*, and after directing how the *registry* is to be kept in future, it enacts in substance, that in every seaport in the U. K. in which there is a Local Marine Board, such board shall establish a shipping office or shipping offices, and may procure the requisite premises and appoint, and from time to time remove and re-appoint, superintendents of such offices, to be called *shipping masters*, with any necessary deputies, &c., who are to obey the directions of the Local Marine Board by which he is appointed. Deputies, clerks, and servants shall, before entering upon their duties, give such security (if any) for the due performance thereof as the Board of Trade may require; and every act done by or before any deputy duly appointed shall have the same effect as if done by or before the shipping master: provided that if in any case any two members of any Local Marine Board complain to the Board of Trade, that any shipping master, deputy, clerk, or servant appointed by such Local Marine Board does not properly discharge his duties, the Board of Trade may investigate the case, and may, if the complaint is substantiated, remove him from his office, and may provide for the proper performance of his duties until another person is properly appointed in his place. The general business of shipping masters so appointed is to afford facilities for engaging seamen by keeping registries of their names and characters, to superintend and facilitate their engagement and discharge, to provide means for securing the presence on board at the proper times of men who are so engaged, and

<sup>a</sup> 14 & 15 Vict. c. 96, s. 6.

<sup>b</sup> 16 & 17 Vict. c. 131, s. 31.

to perform such other duties in respect of seamen as are committed CHAP. IV. to them.

Besides, the Board of Trade may, with the consent of H. M.'s Commissioners of Customs, cause any duties relating to seamen or apprentices which are now performed by officers of customs to be transferred to and performed by shipping masters appointed under the Act. Every owner or master of a ship engaging or discharging any crew or seaman in a shipping office or before a shipping master must pay to the shipping master the whole of the fees made payable by the Act, in respect of such engagement or discharge; and may, for the purpose of in part reimbursing himself, deduct in respect of each such engagement or discharge from the wages of all persons (except apprentices) so engaged or discharged, and retain any sums not exceeding the sums specified. Printed forms of all agreements, advance notes, allotment notes, receipts, discharges, official log books, and other documents which in pursuance of the Act are issued or sanctioned by the Board, for the use of persons engaged in or connected with the merchant service, are to be supplied or sold at all shipping offices at such times, to such persons, at such moderate prices (if any), and in such manner as the Board may direct, or by such other persons as it may license so to do. The Board of Trade may, with the consent of the Commissioners of H. M.'s Customs, direct that at any place in which no separate shipping office is established the whole or any part of the business of the shipping office shall be conducted at the Custom-house. The Board may authorise *sailors' homes* to take and retain fees, and may appoint sailors' homes in London. The Board also may, in any case, dispense with the shipping master's superintendence.

*The Seamen's Protection Act* (8 and 9 Vict. c. 116), (levelled against the cruel and infamous system of *crimping*) also contains some wise and humane regulations respecting this class of our fellow men. It enables the Board of Trade to license persons to procure seamen for merchant ships; and declares that no person not so licensed, or not being the owner, part-owner, master, or person in charge of a merchant ship, or the ship's husband [mate of the ship]<sup>a</sup> shall hire, engage, supply, or provide a seaman<sup>b</sup> to be entered on board any such ship. These licences are to be granted for such period, upon such terms, and upon such security being given, and are revocable, upon such conditions, as the Board of Trade may at any time appoint. With a view to suppress effectually the grievous impositions and great injustices committed on seamen, in this respect, by persons having no interest in the ship, it is declared unlawful for any one (except persons in H. M.'s service) to go and be on board any merchant vessel before her actual arrival in dock, or at the place of discharge, without permission. Again, if any person shall, on board any merchant ship, within 24 hours of her arrival at any port, solicit any seaman to become a lodger at the house of any person not so licensed, or remove the effects of any seaman, except under the personal direction of such seaman, and without the permission of the master, or person in charge of the ship, he is liable

Business may be transferred from customs to shipping masters.

Masters to pay fees, and to deduct part from wages.

Forms issued by the board to be sold at shipping offices.

Business of shipping offices may be transacted at custom-houses.

Suppression of the crimping system.

<sup>a</sup> 13 & 14 Vict. c. 93, s. 3.

<sup>b</sup> This includes apprentices, &c. lb.



- Abbott on Shipping. to a penalty of 5*l*. And a severe penalty is imposed on persons receiving remuneration for board of sailors for a longer period than is due; and also for not returning moneys, &c., belonging to seamen.
- Health, &c. on voyage. As regards their health, &c., on a voyage also, wise provisions are contained in *The Mercantile Act*, 1850. Under severe penalties, each adult seaman must have, for instance, a space of not less than 9 superficial feet measured on the deck or floor; and it must be kept free from stores or goods; and securely and properly constructed and well ventilated.<sup>a</sup> There must be constantly kept on board a sufficient supply of medicines, &c., suitable to accidents and diseases arising on sea-voyages, in accordance with a scale issued by the *Board of Trade*.<sup>b</sup> The master is to keep weights and measures on board to determine the quantities of the several provisions and articles served out; and the like.
- Ships' articles, &c. *The Mercantile Marine Act*, 1850, also contains very wise protective measures relating to *ships' articles*, the advance and allotment of *wages*, discipline on voyage, discharge of crew, and the like; but these subjects fall more appropriately under other chapters of the work.

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## CHAPTER V.

### OF THE AUTHORITY OF THE MASTER WITH REGARD TO THE EMPLOYMENT OF THE SHIP.

A TRADING ship is employed by virtue of two distinct species of contract:—1, The contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places: this is usually done by a written instrument, signed and sealed, and called a charter-party. 2, The contract by which the master or owners of a ship destined on a particular voyage, engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination. A ship employed in this manner is usually called a general ship. The nature of each of these contracts will form the subject of particular discussion hereafter. In the present chapter it is proposed to consider only *the power of the master to bind the owners of the ship by these engagements*.

The owners rarely navigate a trading ship by themselves; the conduct and management of it are almost always entrusted to the master, whether he has or not any property in it. In the latter case, he is the confidential servant or agent of the owners at large; in the former, of his co-partners. Of late, his authority, with regard to the employment of the ship, has been so thoroughly canvassed in our courts, on questions of repairs of ship, of sale, of hypothecation, bottomry bonds, transhipment, and the like, that it is easy to get

<sup>a</sup> 13 & 14 Vict. c. 93, s. 63.

<sup>b</sup> *Ib.* ss. 64—69.

from the various decisions a general notion of his true character. CHAP. V.  
 It is his duty, for instance, in case of damage to the ship, to do all As to re-  
 that can be done towards bringing the adventure to a successful pairs, &c.  
 termination; to repair the *ship*, if there be a reasonable prospect of  
 doing so, at an expense not ruinous; and to bring home the cargo  
 and earn the freight, if possible. He is in a double capacity; he is  
 at once agent of the shipowner, as to ship and freight; and agent  
 of the merchant, as to the goods.<sup>a</sup> He charges the shipowner, by  
 signing bills of lading for such goods as are actually on board.<sup>b</sup> If  
 he is in a *foreign* country, and neither the owner nor his agent  
 is there, and repairs are necessary, he may pledge the owners'  
 credit for them; or if he wants money to repair or victual his  
 vessel, or for other necessities, he must, in the first instance, endeavour  
 to raise it upon the credit of his owners; if he can do so, he  
 has no authority to hypothecate the vessel: but, if he cannot otherwise  
 obtain the money, he may hypothecate the ship. He cannot Power to  
 hypothecate and pledge the personal credit of the owner for the same hypothe-  
 advances. Neither has he authority to hypothecate the ship, unless cate, sell,  
 the payment of the money borrowed be made to depend upon the &c.  
 arrival of the ship.<sup>c</sup> The raising of money upon bottomry, as already  
 stated, can only be justified by *necessity*.<sup>d</sup> When it becomes, by  
 damage, impossible to prosecute the adventure, he has authority  
 even to *sell* the ship for the benefit of all concerned, and to receive  
 the purchase-money.<sup>e</sup> He may, under like circumstances, hypo-  
 thecate freight and cargo, as well as the ship itself.<sup>f</sup> He may, if  
 the necessity arise, and he cannot otherwise raise the money, *sell* a  
 part of the cargo for the repairs of the ship, or other expenses,  
 necessary to enable him to prosecute and complete the voyage.<sup>g</sup> If  
 the necessity arise, he may *tranship* the cargo.<sup>h</sup> Whether he is  
*bound* to do so, has never been expressly determined. It would  
 seem that he is. Speaking of *hypothecation*, *jettison*, and *ransom*, *Ld.*  
*Stowell*, in the *Gratitudine* case, says—"In all these cases the cha-  
 racter of agent, respecting the cargo, is thrown upon the master by  
 the policy of the law, acting on the *necessity* of the circumstances in  
 which he is placed. But it is said that this can only be done for the  
 immediate benefit of the cargo, and not for the repairs of the ship.  
 It is very true that this involuntary agent ought, like an appointed  
 agent, in all cases to act for the best respecting the property. Even  
 in the case of a universal *jactus*, which appears least likely to con-  
 duce to the benefit of the cargo,—still it is so, the ship is compelled,  
 in that case, to pay an average, by which means the little which is  
 to be taken as a remnant of the cargo is preserved; whereas, other-

<sup>a</sup> *Benson v. Chapman*, 8 C. B. 963;  
*Shipton v. Thornton*, 9 A. & E. 327; the  
*Gratitudine*, 3 Rob. Adm. R. 259; *Dun-*  
*can v. Benson*, 1 Exch. 555; *Beldon v.*  
*Campbell*, 6 Exch. 891; *Frost v. Oliver*,  
 2 E. & B. 306.

<sup>b</sup> *Hubbersty v. Ward*, 8 Exch. 330;  
*Grant v. Norway*, 10 C. B. 686.

<sup>c</sup> *Stainbank v. Fenning*, 11 C. B. 49.  
*Duncan v. Benson*, 1 Exch. 555.

<sup>d</sup> *Ib.* see *ante*, p. 109.

<sup>e</sup> *Ireland v. Thomson*, 4 C. B. 158.

<sup>f</sup> *Justin v. Ballam*, 1 Salk. 34; *The*  
*Gratitudine*, 3 Rob. Adm. R. 240; *The*  
*Jacob*, 4 Ib. 245, 3 Hagg. 87; *Duncan*  
*v. Benson*, 1 Exch. 551; *Smith's Merc.*  
*L. Ch.* 7.

<sup>g</sup> *Richardson v. Nourse*, 3 B. & A.  
 237; *Duncan v. Benson*, 1 Exch. 555.

<sup>h</sup> *Shipton v. Thornton*, 9 A. & E. 327.

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wise, both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo, *may* eventually consume the whole, the proprietor will not be benefited in such a case, but he cannot be dammified; he will have had the chance of advantage without the danger or possibility of loss; for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship." In another part of the same judgment, he says—"There are other cases also in port in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor, suppose the vessel unable to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? he *must*, in such case, exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted, in argument, that he is not absolutely bound to tranship, he may not have the means of transshipment, but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to *sell*, unless it can be said that he is under an obligation to let it perish."<sup>a</sup>

When he  
has not  
authority.

As already stated, by the general authority which the master has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged.<sup>b</sup> But this authority does not *usually* extend to cases where the owner can himself personally interfere; as in the *home* port, or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required.<sup>c</sup> Therefore, if the owner or his general agent be at the port or so near to it, as to be reasonably expected to interfere personally, the master cannot, unless specially authorised, or unless there be some custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or to his agent to do what is necessary. Repairs are only instances of the above rule. If money be necessary, it may also, under the circumstances stated, be raised upon credit.<sup>d</sup> What has been said presupposes too the *usual employment of the ship*; for if not so employed the owners are not liable.<sup>e</sup> Again he has authority to borrow money and the like for prosecuting the voyage, but not to pay for services already rendered.<sup>f</sup>

Another point of importance is well expressed by Ch. Just. *Jervis*, in a recent case;—"He may (says he) make contracts for the hire of the ship, but cannot vary that which the owner has made.

<sup>a</sup> See *Vlierboom v. Chapman*, 13 M.

<sup>d</sup> *Arthur v. Barton*, 6 M. & W. 144.

& W. 230.

<sup>e</sup> *Newberry v. Colvin*, 7 Bing. 190;

<sup>b</sup> *Belden v. Campbell*, 6 Exch. 891;

the *Druid*, 1 W. Rob. 391.

explained in *Frost v. Oliver*, 2 E. & B. 306.

<sup>f</sup> *Beldon v. Campbell*, 6 Exch. 886; *Frost v. Oliver*, 2 E. & B. 306.

<sup>c</sup> *Ante*, pp. 111, 135.

He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So with regard to goods put on board he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and, *if a more limited one is given, a party not informed of it is not affected by such limitation.* The master is a general agent to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him.<sup>a</sup>

The authority of the master is to provide *necessaries* only: and the creditor is required to prove the actual existence of the necessity of those things which give rise to his demand.<sup>b</sup> The term *necessaries* means whatever is fit and proper for the service on which a vessel is engaged, and whatever the owner of that vessel, as a prudent man, would have ordered if present at the time.<sup>c</sup>

If the master expend moneys of his own for these purposes, he has a right to call upon the owners to repay him.<sup>d</sup>

The mere fact of taking a licensed pilot on board does not exonerate the master and crew from the proper observance of their own duty. Although the directions of the pilot may be imperative on them as to the course the vessel is to pursue, the management of her is still under the control of the master. It is the master's duty to have the safe conduct of her by issuing the necessary orders, and it is the duty of the crew to carry these orders into execution; and for the due performance of these relative duties the master and crew are still respectively responsible.<sup>e</sup> How and when the fact of having a licensed pilot on board exempts the owners from responsibility will be found in a following page.

The master also is answerable for his own contract; <sup>f</sup> for in favour of commerce the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a twofold remedy against the one or the other. And this rule of the law of England agrees with the law of other commercial nations. When the Romans began to engage in commerce, a new species of action under a particular name appears to have been introduced to ascertain and enforce this responsibility of the owners for the acts of their servants,<sup>g</sup> and by the Prætorian edict the owners, or (to render the Latin word more nearly) the employers of the ship are made responsible for the faults of the mariners and master, and for the contracts also of the master but not for the contracts of the mariners, because the mariners are not appointed for the purpose of conducting the business of the ship, but only of labouring in its navigation under the orders of the master. And with regard to the contracts of the master a distinction is taken

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Limited authority.

What are necessaries, &amp;c.

Duty when licensed pilot is on board.

Personal liability.

Owner's liability for the master's acts.

<sup>a</sup> Grant v. Conway, 10 C. B. 686; Smith's Merc. L. 59.

<sup>b</sup> Mackintosh v. Mitcheson, 4 Exch. 175.

<sup>c</sup> Webster v. Seekamp, 4 B. & A. 354; the Alexander, 1 Wm. Rob. 346.

<sup>d</sup> Roccus, Not. 34, 35.

<sup>e</sup> The Diana, 1 W. Rob. 131; 4 Moo. P.C. 11; Hammond v. Rogers, 7 Ib. 160.

<sup>f</sup> Morse v. Slue, 1 Vent. 190, 238.

<sup>g</sup> Dig. 4, 9. Nautæ, cauponæ, stabularii, ut recepta restituant.

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by the commentators on the edict between such as the owners have authorised him to make and such as they have not authorised him to make; but in general it appears that they were answerable. A charter-party made by the master *in his own name* furnishes no direct action against the owners grounded *upon the instrument itself* by the law of England: but when this contract is made by the master in a foreign port in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud, or when it is made by him at the ship's home under circumstances which afford evidence of the assent of the owners; the ship and freight, and therefore indirectly the owners also, to the amount of the value of the ship and freight, are by the marine law bound to the performance.<sup>a</sup> "The ship is bound to the merchandise and the merchandise to the ship," are the words of Cleirac.<sup>b</sup> It is true indeed that this principle of the maritime law by which the ship itself *in specie* is considered as a security to the merchant who lades goods on board of it, cannot be carried into effect in this country, because the Court of Admiralty, in which alone proceedings can be carried on against the ship, has no jurisdiction in such a case. But I apprehend the owners may be made responsible, either by action at the common law, or by a suit in equity, for the faithful performance of the stipulations of a charter-party made by the master under the circumstances before mentioned. The general rule before laid down, viz.: That the owners are bound by every lawful contract made by the master relative to the usual employment of the ship is proved, as to the case of a general ship, by the following judicial authorities.

In the case of *Boson v. Sandford*,<sup>c</sup> which was an action brought against some of the part-owners of a ship employed in the coasting trade between Exeter and London, to recover the value of goods lost, which had been delivered to the master at E. without the knowledge of the owners, to be conveyed from thence to L. The broker had inserted a clause purporting that the ship was to sail with convoy from the place of rendezvous. There was no evidence given either of the assent or dissent of the defendants (the owners) to this warranty or of their knowledge of it. But there was contradictory evidence upon a question made at the trial whether the master had forbidden the broker to insert this clause. His Lordship, however, told the jury that he thought that point quite immaterial, for as the broker was authorized to advertize the ship, the owners were answerable to strangers for his acts, although he had exceeded his authority; and must seek their remedy against him. And the plaintiff succeeded in the cause. From this rule of law by which the owners are bound to the performance of these contracts, it follows as a corollary that they must answer for a breach of them, although committed by the master or mariners against their will and without their personal

<sup>a</sup> An instance of a sentence in Spain against master and ship for barratry and deviation by the master, who had let the ship by a charter-party, is mentioned in an anonymous case in 2 Ch. Ca. 238.

<sup>b</sup> *Les Us et Coutumes de la Mer*, p. 72.

<sup>c</sup> Carth. 58; 3 Lev. 258; 3 Mod. 321; 1 Show. 29, 101. *Note*: It would now be held, that as the defendants had not pleaded in abatement, they could not avail themselves of the ground upon which this case was decided against the plaintiff.

ult.<sup>a</sup> The master being the servant of the owners it follows that they are responsible also for his wrongful acts. But observe, they are not liable for the consequences of his wilfully doing an illegal act, only for his doing a lawful act negligently.<sup>b</sup> CHAP. V.

The great responsibility which the laws of commercial nations cast upon the owners for the acts of the master in this and other cases has appeared to many persons at first view to be a great hardship; it laying aside all consideration of the opportunities of fraud and illusion which would otherwise be afforded, it should always be remembered that the master is elected and appointed by the owners; and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and if the merchants whom he deceives could not have dressed against those who appointed him, they would often have just reason to complain that they had sustained an irreparable injury through the negligence or mistake of the owners, as the master is seldom of ability to make good a loss of any considerable amount.

Intimately connected with the liability of the owners for the acts of the master is that of their exemption when a licensed pilot is on board. There seems to be a generally received notion, that if the taking a licensed pilot on board be compulsory (as contradistinguished from voluntary), the owners of a vessel doing damage, when the accident is occasioned from or by reason or by means of any neglect, default, incompetency, or incapacity of such pilot, are exempt from responsibility; and that this is rather from a rule of the common law than from the language of the pilot act; being thought only fair and just that they should not be answerable for the acts of one forced upon them. The Admiralty Court seems still to adhere to this doctrine,<sup>c</sup> notwithstanding the case of *Lucey v. Ingram*<sup>d</sup> (a well-considered judgment of the Court of Exchequer), which puts it upon a somewhat different ground. That case seems to decide this:—that although the owner be not compelled to employ a pilot at all, yet if a pilot be bound, when called upon, to take charge of the ship, and one is called upon and acts in charge of her, the owners are exempted from responsibility for acts resulting from the mismanagement of such pilot: in other words, *Lucey v. Ingram* enlarges the language of the exempting clause of the general Pilot Act (6 Geo. 4, c. 125) to a case optional on the part of the owner to employ, but obligatory on the part of the pilot to serve.<sup>e</sup> *Utrum horum navis accipe*. All seem agreed on this:—that the damage must arise solely and entirely through the ignorance, incapacity, or misconduct, of the pilot, otherwise, the owners are not exempt; for instance, suppose it arise partly from the misconduct of the pilot, and partly from that of the master or crew of the vessel proceeded against, the exemption in the Act does not apply.<sup>f</sup> It is not enough, it seems, to prove only that there was

Responsibility when licensed pilot is on board.

<sup>a</sup> *Vide* *Dewell v. Moxon*, 1 Taunt. 391; *Burgon v. Sharpe*, 2 Camp. 529.

<sup>b</sup> *The Druid*, 1 Wm. Rob. 406.

<sup>c</sup> *The Maria*, 1 Wm. Rob. 109, (where the cases of *Att. Gen. v. Case*, and *Carruthers v. Sydebotham*, are ably commented on); *the Agricola*, 2 Ib. 20.

<sup>d</sup> And see *the Fama*, 2 Ib. 185.

<sup>e</sup> 6 M. & W. 302.

<sup>f</sup> *The Diana*, 1 W. Rob. 131; 4 Moo. P. C. 11; *the Vernon*, Ib. 320; *the Massachusetts*, Ib. 371; *the Atlas*, 2 Ib. 505; *the Batavier*, Ib. 407; *the Eden*, Ib. 449; *The Lochlibo*, 3 Ib. 310;

*Abbott on Shipping.* a licensed pilot on board; the owners must go further, and show that the damage arose from the fault of the pilot alone.<sup>a</sup> Should it be asked when it is *compulsory* to take a pilot, I answer, that a statute need not use the word *obliged*, *required*, or the like, to make it so: if, for instance, it make the owner or master, in case of neglect, or refusal, to employ a licensed pilot, liable to pay pilotage dues, or if it give a penalty, it is compulsory.<sup>b</sup> The same rules apply equally to *foreigners*.<sup>c</sup> Recently an attempt was made to make the owner of a *steam tug* liable; but the Court said, that as there was a licensed pilot on board the vessel, and no error or neglect on the part of the steamer, the owners of it were not liable.<sup>d</sup> The master of a *coasting vessel* is not bound to employ a pilot; but he *may* do so. The person employed, if any one, must be a person duly licensed to act as a pilot.<sup>e</sup> All trade by sea from one part of the U. K. to any other part thereof, or from one part of the *Isle of Man* to another part thereof, is a coasting trade, and all ships while employed therein are coasting ships.<sup>f</sup> So long as he is not assisted by any unlicensed pilot, or by any one not of the ordinary crew, the master may pilot any collier, &c.<sup>g</sup> So, as we shall find more minutely described in the chapter on *Pilots*, he may pilot his own vessel, within the limits in regard to which he has passed his examination, without the assistance of a licensed pilot, upon passing an examination, and obtaining the requisite certificate.

When compulsory.

Employing unlicensed pilot.

Master or mate piloting their own ship.

## CHAPTER VI.

## BEHAVIOUR OF THE MASTER AND MARINEERS.

THE great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. For, as detailed more fully in the next preceding chapter, if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, he is personally responsible for it; and although the merchant may elect to sue the owners, they will have a remedy against him to make good the damages which they may be compelled to pay. So, if he make any particular engagement or warranty without a sufficient authority from his owners, although the owners may be answerable to the persons with whom he contracts, by reason of the general power belonging to his

Hammond v. Rogers, 7 Moo P. C. 160.

<sup>a</sup> The Protector, 1 lb. 55.

<sup>b</sup> The Maria 1 W. Rob. 95.

<sup>c</sup> The Vernon, 1b. 320; the Sophie, 1b. 368; the Johan Friederich, 1b. 37.

<sup>d</sup> The D. of Manchester, 2 Wm. Rob. 473, and see the D. of Sussex, 1 lb. 273.

<sup>e</sup> Beilby v. Scott, 7 M. & W. 97.

<sup>f</sup> 6 Geo. 4, c. 107, s. 100.

<sup>g</sup> 6 Geo. 4, c. 125, s. 59; 12 & 13 Vict. c. 88; 16 & 17 Vict. c. 129; post Pilots; and see Usher v. Lyons, 2 Price 118; the Christiana, 2 Hagg. 183; Lacey v. Ingram, 6 M. & W. 302; Beilby v. Scott, 7 lb. 93.

situation and character, he is in like manner responsible to the owners CHAP. VI.  
for the injury sustained by them in consequence of his acting beyond,  
or in violation of, the particular authority given to him.

With respect to both master and mariners, the legislature has intro- Refusal to  
join, deser-  
tion, &c.  
duced many important rules.\* By these rules, the contract for ser-  
vice must be made with the master, by a written agreement signed  
by him and the mariners. If any seaman, after signing the agree-  
ment, or any apprentice, wilfully neglects or refuses to join his ship,  
or deserts, he may be, independent of its working a forfeiture of  
part or the whole of his wages, which will be found in the chapter  
exclusively devoted to that subject, summarily punished by impris-  
onment, for a period not exceeding 12 weeks, with or without hard  
labour, at the discretion of the Court or justice inflicting the same.  
In case the master, or the owner or his agent, so requires, the Court  
or justice may, instead of committing the offender to prison [or after  
imprisonment and before the termination of his sentence<sup>b</sup>], cause him  
to be conveyed on board, and may order any costs and expenses  
properly incurred to be paid by the offender, and, if necessary, to be  
deducted from any wages. Whenever a seaman or apprentice neglects  
or refuses to join, or absents himself without leave, or deserts from  
any ship in which he is engaged to serve, the master or any mate, or  
the owner, ship's husband, or consignee, may, for the purpose of car-  
rying him before a justice, apprehend or require any police officer or  
constable to apprehend him without a warrant. If, in the course of  
a voyage any seaman or apprentice is found absenting himself from  
his ship without leave, the master or any mate, or the owner, ship's  
husband, or consignee, may, in any place in H. M.'s dominions, with  
or without the assistance of the local authorities, who are hereby directed  
to give the same, if required, and also at any place out of H. M.'s domi-  
nions, if and so far as the laws in force at such place will permit, appre-  
hend him; and shall thereupon, if he so requires and if practicable,  
convey him before some Court or justice capable of hearing his com-  
plaint, to be dealt with according to law, or may, if he does not so  
require, or if there is no such Court or justice at or near the place, at  
once convey him on board. Entries and certificates of desertion  
abroad are to be copied and sent home to the Registrar of Seamen.

Any master or mate of, or any seaman or apprentice belonging to, Misconduct  
endangering  
ship or life  
or limb a  
misdemean-  
nor.  
any British ship, who, by wilful breach of duty, or by neglect of duty,  
or by reason of drunkenness, does any act tending to the immediate  
loss, destruction, or serious damage of such ship, or tending imme-  
diately to endanger the life or limb of any person belonging to or on  
board of such ship, or who, by wilful breach of duty, or by neglect  
of duty, or by reason of drunkenness, refuses or omits to do any  
lawful act proper and requisite to be done by him for preserving such  
ship from immediate loss, destruction, or serious damage, or from  
preserving any person belonging to or on board of such ship from  
immediate danger to life or limb, shall for each such offence be  
deemed guilty of a misdemeanor. Any seaman or apprentice who

\* The *Mercantile Marine Act*, 1850;  
13 & 14 Vict. c. 93, s. 46; and the  
*Mercantile Marine Amendment Act*,

1851 (14 & 15 Vict. c. 96).

<sup>b</sup> 16 & 17 Vict. c. 131, s. 38.



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**Punishment.**

whilst on service commits any of the following offences, and who then is or afterwards arrives or is found at any place in which there is a Court or justice capable of exercising summary jurisdiction under the Act, may, on due proof of the offence, and of such entry thereof in the log-book, be summarily punished by imprisonment, with or without hard labour, not exceeding in duration the several periods following (that is to say):—1. Twelve weeks for wilfully damaging the ship, or embezzling or wilfully damaging any of her stores or cargo. 2. Twelve weeks for assaulting any master or mate. 3. Four weeks for wilful disobedience to any lawful command. 4. Twelve weeks for continued wilful disobedience to lawful commands, or for continued wilful neglect of duty. 5. Twelve weeks for combining with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage. Observe, nothing herein contained, takes away or abridges any powers which a master has over his crew. Whenever any act of misconduct is committed which is by the agreement subject to a fine, the appropriate fine shall, if an entry of the offence is made and attested in the official log-book, and if the offence is proved to the satisfaction of the shipping master to whom the fine is to be paid, be deducted from the wages of the offender. Whenever in any proceeding under the General Merchant Seamen's Act, or the Mercantile Marine Act, 1850, any question arises concerning any offence committed by a seaman or apprentice which is punishable under either of such Acts, the Court or justice hearing the same may, if the justice of the case requires, order the offender to be punished, both by lawful imprisonment appropriate to the case, and in addition may make such order in regard of wages accruing due in the meantime as to such court or justice may seem fit. No seaman or apprentice shall be entitled to any pecuniary allowance on account of any reduction in the quantity of provisions furnished to him during such time as he wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct either on board or on shore, or during such time as such quantity may be reduced in accordance with any regulation for reduction by way of punishment contained in the agreement.

**Naval court  
for hearing  
complaints  
on the high  
seas and  
abroad;**

**its constitution ;**

If, whilst any ship is out of H. M.'s dominions, a complaint is made by the master or by any of the certificated mates, or by one-third or more of the seamen in her crew, or by the consignee, to any naval officer in command of any ship of H. M., or, in the absence of such naval officer, to any consular officer, such naval or consular officer shall thereupon, if circumstances admit, and if he thinks the case requires immediate investigation, but not otherwise, summon a court consisting of not more than five and not less than three members, of whom, if possible, one shall be a naval officer not below the rank of lieutenant, one a consular officer, and one a master of a British merchant ship, and the rest shall be either naval officers, masters of British merchant ships, or British merchants; and such court may include the naval or consular officer summoning the same, but shall not include the master or consignee of the ship to which the parties complaining or complained against may belong; and the

al or consular officer on such court, if there is only one such CHAP. VI.  
 er on the court, and if there is more than one, the naval or and powers.  
 sular officer who, according to any regulations for settling their  
 ictive ranks for the time being in force, is of the highest rank,  
 ll be the president of such court; and such court shall hear the  
 e, and may for that purpose summon and compel the attendance of  
 ties and witnesses, and administer oaths and affirmations, and  
 er the production of documents, and may discharge any seaman  
 m his ship, and may, if the court is unanimous that the safety of  
 ship or crew, or the interests of the owner, absolutely require it,  
 versede the master, and appoint another person to act in his stead,  
 h appointment to be made with the consent of the consignee Report to be  
 the ship, if then at the place, and shall, whether any order is sent home.  
 de or not, make a report containing a statement of the proceed-  
 s and of the evidence, and send it to the Board of Trade; and  
 sh report, if purporting to be signed by the senior naval officer or  
 ster, or to be sealed with the consular seal, and if produced out  
 the custody of the Board of Trade or its Officers, shall be admitted  
 evidence in any legal proceeding. And such court may order the Costs of pro-  
 sts of the proceeding before it (if any), or any portion thereof to ceeding and  
 paid by any of the parties thereto, and may order any person compensa-  
 aking a frivolous or vexatious complaint to pay compensation for tion for  
 y loss or delay caused thereby; and any cost or compensation so delay.  
 dered shall be paid by such person accordingly, and may be  
 covered in the same manner as other sums hereby made recover-  
 le, or may, if the case admits, be deducted from his wages; and  
 e Board of Trade may, in any case in which it thinks fit so to do,  
 ay any costs of any such proceeding, and make any reasonable  
 mpensation for any damage or delay caused thereby. Any person Penalty for  
 ho wilfully and without due cause prevents or obstructs the making preventing  
 r investigation of any such complaint as aforesaid, shall for each complaint.  
 ffence be liable to a penalty not exceeding 50*l*, or to imprisonment,  
 ith or without hard labour, for a period not exceeding 12 weeks.  
 The Board of Trade is to sanction forms of log-books, which  
 re to be invariably employed and properly kept. Entries of fines  
 nd punishments are to be made in the log, and attested; also  
 f conduct generally; of illness, injury, death, and of seamen leaving  
 hip. Changes in crew, if any, are to be reported; official logs  
 must be delivered by foreign-going ships on arrival, otherwise they  
 re not to be cleared. Official logs are also to be delivered by home  
 rade ships half-yearly, otherwise they are not to receive transire.  
 ogs to be sent home in case of transfer or loss of ship, and to be  
 e-delivered to master or owner. Penalties are imposed for not  
 eeping log. When a ship is sold at a *foreign* port, except in Sale of ship  
 ases of wreck or condemnation, the crew are to be provided with in foreign  
 mployment on board a homeward bound vessel or sent home, at the port.  
 xpense of the master or owners, unless they publicly consent to be  
 ischarged.\* As to the effects of a seaman dying abroad, if he die Seaman dy-  
 lsewhere than on board, the consul must claim and take charge of ing abroad.  
 hem for the next of kin. If no claim be made within 3 months  
 after his death the proceeds, less the expenses, are to be paid over

\* 7 & 8 Vict. c. 112, s. 17.

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Shipping.*

Forcing on  
shore, &c.

Entering  
the Royal  
Navy.

Master's  
common law  
authority  
over crew  
and passen-  
gers.

by him to the Board of Trade, whence it passes to the exchequer and made part of the consolidated fund.<sup>a</sup> The forcing on shore or leaving behind any of the crew, on shore or at sea, in or out of H. M.'s dominions, before the completion of the voyage for which he was engaged, is a misdemeanour punishable by fine or imprisonment, or both. A seaman, however, may be discharged by the sanction in writing of certain public functionaries. He is not to be left abroad on the plea of incapacity to proceed, desertion, or disappearance, without a like authority. Any seaman, it should be repeated, may enter the *Royal Navy* without being guilty of desertion or incurring any penalty or forfeiture.<sup>b</sup> Again, no seaman is to be shipped at a *foreign* port without the privity of the consul.

By the common law the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relating to the navigation of the ship and the preservation of good order; and such obedience they expressly promise to yield to him by the agreement made for their service. In case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority in this respect being analogous to that of a parent over his child, or of a master over his apprentice or scholar.<sup>c</sup> Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board. But it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression. The framers of the ancient marine ordinances appear studiously to have avoided the mention of this power. The French ordinance of 1681<sup>d</sup> specified certain particular modes of punishment, which the master might inflict on "Drunken and disobedient mariners, and those who ill-treat their comrades, or commit other like faults in the course of their voyage," but it required the consent of the steersman and mate. By the law of England such consent is not required; nevertheless, the master should, except in cases requiring his immediate interposition, take the advice of the persons next below him in authority, as well to prevent the operation of passion in his own breast as to secure witnesses to the propriety of his conduct. For the master, on his return to this country, may be called upon by action at law to answer to a mariner, who has been beaten or imprisoned by him, or by his order, in the course of a voyage; and for the justification of his conduct, he should be able to show not only that there was a sufficient cause for chastisement, but also that the chastisement itself was reasonable and moderate, otherwise the mariner may recover damages proportionate to the injury received.<sup>e</sup> A seaman may also

<sup>a</sup> 7 & 8 Vict. c. 112, s. 31, and 16 & 17 Vict. c. 131, s. 27.

<sup>b</sup> 7 & 8 Vict. c. 112, s. 50, altered by 16 & 17 Vict. c. 131, s. 35, as to the mode of payment of wages.

<sup>c</sup> Magister nullam habet jurisdictionem ingentem suarum navium, sed quandam tantum œconomicam potestatem vel disciplinam, quæ usque ad levem castigationem, pro corrigenda insolentia et male morata vita seu licentia nautarum et vectorum; quemadmodum eam tenet pater in filios, magister in discipulos, dominus in servos vel familiares. Casa regis, Disc. 136, n. 14, cited by Valin, on the French Ord. t. 1, p. 449. See also Ord. of Phil. 2, A.D. 1563; 2 Mag. 19, Molloy, b. 2, ch. 3, s. 12; Watson v. Christie, 2 B. & P. 224.

<sup>d</sup> Liv. 2, tit. 1, Du Cap. art. 22.

<sup>e</sup> Watson v. Christie, 2 B. & P. 224.

obtain redress in the Admiralty Court.<sup>a</sup> If the master strike a mariner without cause, or use a deadly weapon as an instrument of correction, where moderate correction may be inflicted, and death ensue, he will be guilty either of manslaughter or murder,<sup>b</sup> according to the rules and distinctions of the criminal law of England in analogous cases, all of which are applicable to persons in this situation. All offences committed at sea may now be tried under an Admiralty commission,<sup>c</sup> or at the Central Criminal Court, and punished as if they had been committed on shore. In the case of actual and open mutiny by the crew or any part of them, the resistance of the master becomes an act of self-defence, and is to be considered in all its consequences from that point of view. The ordinances of Oleron<sup>d</sup> and Wisbuy,<sup>e</sup> declare that a mariner who strikes the master, shall either pay a fine or lose his right hand; a strange as well as cruel alternative unknown in the modern jurisprudence of this country.

But although the master may by force restrain the commission of great crimes, he has no *judicial* authority to punish the criminal, but ought to secure his person and cause him to be brought before a proper tribunal to be tried for his crime according to the laws of his country.<sup>f</sup>

Over *passengers*, likewise, the master has great authority. They must, for instance, do works of necessity, for the preservation of life and property; and the master may compel them to do such things. On the approach of an enemy, he has the power to assign to each his post, and each must obey him. If a passenger refuse to obey such order, even his confinement (if necessary for the discipline of the crew and the security of the vessel) may be justified. But *necessity* alone can justify such an exercise of power.<sup>g</sup> Passengers, on the other hand, are to be provided with good provisions. But it is not (as Ch. J. *Denman* said) because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain, who does not provide all that he ought: a jury must be satisfied that there was a real grievance sustained by the passenger.<sup>h</sup>

Barratry, setting fire to, and otherwise damaging ships, are subjects naturally ranging themselves under this head, but as they have been fully considered in a former part of this work it would be worse than idle to repeat them.<sup>i</sup>

*As to the offence of not resisting pirates and enemies.*<sup>k</sup> It appears formerly to have been a practice with the Turkish pirates to restore a ship, and the goods of the master and mariners, and sometimes even to pay the whole or a part of the freight, if the ship yielded

<sup>a</sup> *Lowther Castle*, 1 Hagg. 384; *Enchantress*, Ib. 395.

<sup>b</sup> *Kid's case*, 5 State Trials, 287.

<sup>c</sup> See 4 & 5 Wm. 4, c. 36.

<sup>d</sup> Art. 12.

<sup>e</sup> Art. 24.

<sup>f</sup> *Hans. Ord.* art. 30; *French Ord.* b. 2, tit. 1; *Du Cap.* art. 23; *Roccus*, Not. 8, and see 7 Geo. 4, c. 38, as to the jurisdiction of a *Justice of the Peace*

in piracy, &c.

<sup>g</sup> *Boyce v. Bayliffe*, 1 Camp. 58; *Newman v. Walters*, 3 B. & P. 612; see also *Prendergast v. Compton*, 8 C. & P. 454; *Clutterbuck v. Coffin*, 1 Dowl. N. C. 486.

<sup>h</sup> *Young v. Fewson*, 8 C. & P. 56.

<sup>i</sup> *Ante*, p. 32.

<sup>k</sup> See *Hans. Ord.* Art. 35, 36, 37, and *Roccus*, Not. 70.

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warding  
seamen.

to them, and they were suffered to take out the cargo without resistance. To prevent this practice, a Statute was passed so long ago as the reign of K. C. 2,<sup>a</sup> in the preamble whereof this practice is recited, and by which the master of any vessel of a burthen not less than 200 tons, and furnished with 16 guns, is forbidden to yield his cargo to pirates of any force, without resistance, on pain of being rendered incapable to take charge of any English vessel afterwards. And if the ship is released, and anything given by the pirates to the master, such gift and his share of the ship are to go to the owners of the goods. And any ship of less burthen or force than before mentioned, is forbidden to yield to a Turkish pirate, not having double her number of guns, without fighting. An extraordinary instance of the courage and skill, which the Legislature of those times attributed to English seamen, and which the exploits of succeeding generations have so often and so gloriously exemplified! By the same Statute it is enacted, "that if the mariners or inferior officers of any English ship, laden with goods and merchandises as aforesaid, shall decline or refuse to fight, and defend the ship when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, that every mariner who shall be found guilty of declining, or refusing as aforesaid, shall lose all his wages due to him, together with such goods as he hath in the ship, and suffer imprisonment, not exceeding the space of six months, and shall during such time be kept to hard labour for his or their maintenance." And the statute of 11 & 12 Wm. 3, c. 7, made perpetual by 6 Geo. 1, c. 19, made the offence of voluntarily yielding up to pirates a *capital crime*. The Legislature, however, has not been less studious to reward and provide for deserving mariners, than to punish the fraudulent or the fearful. To this purpose, it has been enacted,<sup>b</sup> "that when any English ship shall have been defended against any pirates, enemies, or sea-rovers, by fight, and brought to her designed port, in which fight any of the officers or seamen shall have been killed or wounded, it shall and may be lawful to and for the judge of H. M.'s High Court of Admiralty, or his surrogate in the port of London, or the mayor, bailiff, or chief officer, in the several outports of this kingdom, upon the petition of the master or seamen of such ship, so defended as aforesaid, to call unto him four or more good and substantial merchants, and such as are no adventurers or owners of the ship or goods so defended, and have no manner of interest therein, and by advice with them to raise and levy upon the respective adventurers and owners of the ship and goods so defended, by process out of the said Court, such sum or sums of money, as himself and the said merchants by plurality of voices shall determine and judge reasonable, not exceed-

<sup>a</sup> 16 Car. 2, c. 6; 22 & 23 Car. 2, c. 11.

<sup>b</sup> 11 & 12 Wm. 3, c. 7, s. 11. See also 22 & 23 Car. 2, c. 11, s. 10. By the Hanseatic Ordinance, Art. 35, a seaman disabled in defending a ship

against rovers is to be maintained during his life, at the common charge of those concerned in a general average. And the Hanseatic Ordinance of the year 1614, is to the same effect. Tit. 14 art. 3.

ing 2*l.* per cent. of the freight, and of the ship and goods so defended, according to the first costs of the goods ; which sum or sums of money so raised, shall be distributed among the captain, master, officers, and seamen of the said ship, or widows and children of the slain, according to the direction of the judge of the said Court, or his surrogate in the port of London, or the mayor, bailiff, or chief officer, in the several out-ports of this kingdom, with the approbation of the merchants aforesaid, who shall proportion the same according to their best judgment unto the ship's company as aforesaid, having special regard unto the widows and children of such as shall have been slain in that service, and such as have been wounded or maimed." By two subsequent statutes, seamen in the Merchants' service, disabled in fight against a pirate,<sup>a</sup> or enemy,<sup>b</sup> were to be admitted into, and provided for, in Greenwich Hospital, the great asylum for decayed and disabled seamen belonging to the Royal Navy : but that hospital being found insufficient for this addition to the primary objects of its institution, another national establishment was erected, by the 20 Geo. 2, c. 38, "for the relief and support of maimed and disabled seamen, and the widows and children of such as shall be killed, slain, or drowned, in the Merchants' service." This Act was amended by the 4 & 5 Wm. 4, c. 52, of which the chief enactments are—that the president and governors are empowered to relieve disabled seamen and their widows and children, provided a certificate of the hurt received be produced ; that decrepit seamen are not to be entitled to the benefit of the Act, unless they have served 5 years, and contributed monthly. To effect such ends, all masters and owners of merchant ships are to pay 2*s.* a month, and all seamen 1*s.* a month to the Receiver appointed at the different ports. The master is to retain this sum out of the seaman's wages, and pay it over to the receiver at the port of discharge. No seaman can have the benefit of this Act, unless he pay the duty. Those who have served the longest, and contributed most, are to be first provided for. Maimed seamen are to be provided for at the port where the accident happens. Disabled seamen, having served and paid 5 years, are to be provided for where they have contributed most. Seamen who have been shipwrecked, or made prisoners by the enemy, may be relieved. These are a few of the provident and humane clauses of this Act. The 5 & 6 Wm. 4. c. 19, improved still more on these noble efforts in the cause of humanity ; but that Act was repealed by the *General Merchant Seamen's Act* (7 & 8 Vict. c. 112), which, in its turn, contains those rules and regulations which have been already given, and many others too numerous to mention, except in a general way.

<sup>a</sup> 8 Geo. 1, c. 24.

<sup>b</sup> 8 Geo. 2, c. 29, s. 10.

## CHAPTER VII.

## PILOTS.

THE name of pilot, or steersman, is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and of the ship's route; or to a person taken on board, at a particular place, for the purpose of conducting a ship through a river, road, or channel, or from or into a port. It is to pilots of the *second* description that I now refer. The question of the shipowner's exemption from responsibility for damage done when a pilot is on board, is treated of in a former chapter.<sup>a</sup>

**Acts relating to them.** The principal statute, relating to pilots and pilotage, is the 6 Geo. 4, c. 125. So much of it, however, as relates to *Cinque Port* pilots, has been repealed by the 16 and 17 Vict. c. 129. For centuries, it appears, the Corporation of Trinity House of Deptford Stroud, and the Society or Fellowship of Pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, commonly called *Cinque Port Pilots*, have appointed pilots, loadsmen, or guides, to conduct ships within defined limits; but it was deemed expedient that the right of piloting ships outwards from the port of *London*, and inwards as well, should be vested in one body of pilots, and that they should be subject to uniform authority and control. This was effected by the 16 and 17 Vict. c. 129, which unites the two corporations. By it, the Society or Fellowship of Cinque Port Pilots became merged, so to speak, in the Trinity House; which alone has the power, after examination, to license pilots for the passage from *Dungeness*, inwards as well as outwards; and to make regulations for a constant supply of pilots at *Dungeness*.

**Powers of pilotage authorities.** Every *pilotage authority*, that is, the Trinity House, and all other bodies or persons authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage,<sup>b</sup> may, by regulation or bye-law made with the consent of H. M. in council from time to time, do all or any of the following things, in relation to pilots and pilotage, within their respective districts; viz., fix and alter qualifications of pilots; make and alter regulations for the government of pilots, and of certificated masters and mates; alter and reduce rates of pilotage; make and extend exemptions from compulsory pilotage; and arrange the limits of pilotage districts. *And every regulation or bye-law duly made by any pilotage authority in exercise of the powers so given to it and with such consent, is valid and effectual, notwithstanding any act of parliament, rule, law, or custom to the contrary.*

Trinity House regulations are now to be approved by H. M. in council, instead of by a Ch. Just., as under 6 Geo. 4, c. 125. But all such orders are to be laid before both Houses of Parliament. This extends to all ports and districts in Gt. Britain or Ireland, or

<sup>a</sup> P. 139.<sup>b</sup> *Pilotage Law Amendment Act*, 1853 (16 & 17 Vict. c. 129).

the Isle of Man, or in the rivers thereof respectively, or in the seas or channels adjacent thereto respectively, in which any masters of vessels are compelled by law to employ pilots, or in which any persons are licensed or authorised to act as pilots, by or under the authority of law, or in which the rates or prices to be demanded or received for pilotage services, are fixed by law, or under authority derived from law. CHAP. VII.  
Places, &c.  
to which  
the 16 & 17  
Vict. c. 129  
extend.

By virtue of these general powers, the *pilotage authorities* will no doubt make bye-laws and regulations to meet the necessities of different localities; but we must be content, here at least, with statute law, presuming that it remains unaltered by those *non obstante* powers recently conferred upon *pilotage authority*.

In the first place then, an *examination* is necessary. The Trinity House appoints subcommissrs. of pilotage to examine the candidates; and on their certificates of qualification grants licences. The Trinity Houses of *Hull* and *Newcastle* have like powers for places within their respective jurisdictions. *Liverpool* and other ports have similar powers given by local Acts. The Trinity House *licences* are granted for one year and are renewable. A master or mate may now pilot his own vessel within the limits in regard to which he has passed his examination, without the assistance of a licensed pilot, upon passing an examination, and obtaining the requisite certificate.<sup>a</sup> Persons applying for licences must execute a bond for securing obedience to bye-laws. These licences may be revoked, annulled, or suspended. From the decision of the Trinity House, as regards revocation, &c., there is an appeal to the Privy Council. 6 Geo. 4, s.  
125.  
Examina-  
tion.  
Master  
piloting his  
own ves-  
sels.  
Licences.

The names, &c., of pilots appointed must be transmitted to the Trinity House, and a list of pilots annually to the Trinity House and Custom-house. The Commissioners of Customs must also transmit to their principal officers at ports in *England* the names, &c., of pilots residing within the limits of each port. A particular description of the person of every pilot must appear in his licence. And no pilot is allowed to act until his licence has been registered, nor without producing it to the commander of the vessel. The licence is to be delivered up when required, and on the death of a pilot it must be returned to the authority that granted it. Pilots who keep public-houses, &c., (unless authorised) or offend against the revenue laws, &c., forfeit their licences or may be suspended. If suspended, or adjudged to have forfeited their licences, they are liable to a penalty for acting. Licensed pilots may supersede unlicensed ones, and a penalty is imposed on unlicensed persons acting as pilots after a proper pilot shall have offered to take charge of the ship,<sup>b</sup> yet unlicensed persons, &c., may act as pilots, where and so long as a pilot duly licensed and qualified shall not have offered to take the charge of such ship or vessel, or made a signal for that purpose, or where and so long as such ship or vessel shall be in distress, or under circumstances which shall have rendered it necessary for the master of such ship or vessel to avail himself of the best assistance which at Unlicensed  
persons act-  
ing as pilots.

<sup>a</sup> 12 & 13 Vict. c. 88, and 16 & 17 Vict. c. 129. s. 14; *ante*, 140, *post*, 152.

<sup>b</sup> See *Beilby v. Shepherd*, 3 Exch. Rep. 44; *post*, 151.



- Abbott on Shipping.* the time could be procured. Penalties are also imposed on those who shall decline to go off to or take charge of vessels, or who shall quit the same ; for employing or requiring the employment of any boat, &c., beyond what is necessary whereby to increase expense ; for lending licence and for drunkenness, and for conducting any vessel into danger, or injuring the same, or obtaining charge thereof by misrepresentation ; and for not obeying the orders of dock-masters.
- 6 Geo. 4, c. 125.* **Pilots refusing to act, &c.** **Pilot boats.\*** Vessels fitted with black sides and upper streak next the gunwale painted white are to be licensed for having pilots in attendance at sea, &c. If a pilot be carried off in any other boat he must display a flag. A list of such vessels, with the number of hands, is to be annually transmitted to the receiver of sixpenny duty in the port of London.
- Pilot not to be taken to sea beyond his limits, &c.** No pilot can be taken to sea beyond his limits without his consent, except in case of necessity, and then he shall receive 10s. 6d. a day above his pilotage. If pilots quit ships in the Thames or Medway without consent, before arrival at the place to which they are bound, they forfeit their pay, and are liable to a penalty. Every pilot must write his name in the log-book, and the same must be inserted in the report of ships entering the port of London, and reported daily to the Trinity House.
- Remedy for pilotage.** All sums of money which shall become due to any licensed pilot for the pilotage of any ship or vessel, except ships and vessels not having British registers, trading to and from the port of London, shall and may be recovered from the owners or masters of such ship or vessel, or from the consignees or agents thereof, who shall have paid or made themselves liable to pay any other charge for the said ship or vessel in the port of her arrival or delivery, as to pilotage inwards, and in the port from whence she shall clear out or sail as to pilotage outwards ; which sums of money shall and may be levied in such and in the like manner, according to the amount of any such sums of money as aforesaid respectively, as any penalty or penalties of the like amount may be recovered and levied under and by virtue of the Act, demand thereof being made in writing at least fourteen days before such levy. The consignees or agents may retain pilotage which they have paid or are liable to. As regards the pilotage of ships not having British registers trading to and from the port of London, it is provided that the master or other person having the charge of every such ship or vessel which shall enter into or sail from the said port of London, or the consignees of or agents for such ship or vessel, shall pay at the Trinity House in London the full pilotage inwards and outwards respectively of every such ship or vessel ; that is to say, in all cases as to pilotage outwards, the full amount of pilotage for the distance which such ship or vessel shall by law be required to be piloted by such licensed pilot as aforesaid ; and so far as concerns the pilotage inwards, where a duly licensed pilot shall have been on board such ship or vessel, the full amount of pilotage for the distance piloted by him, if greater than that which such ship or vessel shall be so required to be piloted ; and if less,

\* *And see 3 & 4 Vict. c. 68, s. 2.*

or if no such pilot shall have been on board, then the full amount of the pilotage for the distance which such ship or vessel shall be by law required to be piloted as aforesaid; and if such pilotage inwards be not paid within 14 days from the day of such ship or vessel's reporting inwards, the same shall and may be recovered by the said corporation from the master or other persons having the charge of every such ship or vessel, or from the consignees or agents thereof, who shall have paid or made themselves liable to pay any other charge for such ship or vessel in the said port of London, and shall and may be levied, as any penalty may be levied, under the Act. The person appointed by the Trinity House, upon receiving such pilotage, is to give to the person paying the same a certificate thereof in writing, and no ship or vessel, not having a British register, and required by law to be piloted, shall be cleared at the office of H. M.'s customs in the port of London, on her outward-bound voyage, without the production of such certificate as aforesaid. The receiver is then to pay over to the pilot what is due to him; and the residue, with the poundage, is to be carried to the pilots' fund. The Trinity House may, out of the pilotage so received, reward unlicensed persons who have piloted in the absence of a licensed pilot. The amount of pilotage outward of foreign vessel is ascertained according to the scale or amount of the tonnage of every ship or vessel, upon or according to which such ship or vessel shall be rated in the said port of London, to the payment of the light and other dues payable to the Trinity House, or according to the draught of water thereof, as the Trinity House shall, in their discretion, think most proper. The Trinity House is to make regulations with respect to pilotage of small *foreign* vessels. The funds arising from surplus rates of pilotage on ships, not having British registers, are to be applied for relief of indigent pilots, &c.

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6 Geo. 4, c.  
125.

No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whatsoever, from or by reason or means of no licensed pilot being on board of any such ship or vessel, or of no duly qualified pilot being on board thereof, unless it shall be proved that the want of such licensed or of such duly qualified pilot respectively shall have arisen from any refusal to take such licensed or qualified pilot on board, or from the wilful neglect of the master of such ship or vessel in not heaving to, or using all practicable means, consistently with her safety, for the purpose of taking on board thereof any pilot who shall be ready and offer to take charge of the same. The owner of a ship or vessel is not liable in any such case for any loss or damage beyond the value of such ship or vessel, and her appurtenances, and the freight due or to grow due for and during the voyage wherein such loss or damage may happen or arise. And no owner or master of any ship or vessel is answerable for any loss or damage which happens to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of the Act, where and so long as such pilot shall be duly qualified to have the

Liability of  
owners for  
want or in-  
capacity of  
pilot.

*Albott on Shipping.* charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.<sup>a</sup>

6 *Geo. 4, c.* Again, licensed pilots, who have executed the required bond, are  
125. not liable for neglect or want of skill beyond its penalty and the  
Liability of pilotage. But the *Mercantile Marine Act Amendment Act*, 1851,  
pilots for (14 and 15 Vict. c. 96, s. 21) declares, any pilot in charge of any  
neglect, &c. ship, who shall, by wilful breach of duty, or by neglect of duty, or

Master  
piloting his  
own vessel,  
or employ-  
ing unli-  
censed  
persons.

by reason of drunkenness, do any act tending to the immediate loss, &c., of such ship, or tending immediately to endanger life or limb; or who shall refuse or omit to do any lawful act proper to be done to prevent such things, guilty of a *misdeemeanor*. Every master of any ship or vessel who shall act himself as a pilot, not having a certificate to pilot his own vessel, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, is liable to severe penalties. So, a certificated master, who does not employ a duly licensed pilot, must pilot the vessel without the aid of any unlicensed pilot.<sup>b</sup>

The master or other person having the command of any ship or vessel, coming from the westward, and bound to any place in the Thames or Medway, not having a duly qualified pilot on board, shall, on the arrival of such ship or vessel off Dungeness, and until she shall have passed the south buoy of the Brake, or a line to be drawn from Sandown Castle to the said buoy, or have been at anchor for one hour, display and keep flying the usual signal for a pilot to come on board; if he do not do so, or if he decline to take on board the first duly qualified pilot who shall offer, or to give charge of his ship or vessel to such duly qualified pilot, or, if he do not heave to, shorten sail, or otherwise consistently with the safety of the ship or vessel facilitate such pilots coming on board as aforesaid, shall forfeit and pay double the amount of the sum which would have been demanded for the pilotage of such ship or vessel.<sup>c</sup> But the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as in hereinafter provided; or of any other

<sup>a</sup> See *ante*, pp. 139, 140.

<sup>b</sup> 12 & 13 Vict. c. 88.

<sup>c</sup> See *Usher v. Lyon*, 2 Price, 118; *the Christiana*, 2 Hagg. 182; *Lucey v.*

Ingram, 6 M. & W. 313; *Beilby v. Scott*, 7 Ib. 93; and see *Beilby v. Shepherd*, 3 Exch. 44.

ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any act or acts of parliament, or by any charter or charters or the appointment of pilots, may, without being subject to any penalty, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any licensed pilot or other person or persons than the ordinary crew of the said ship or vessel.<sup>a</sup> Again, H. M., by and with the advice of her privy council, or by any order or orders in council, may permit and authorize ships and vessels not exceeding the burthen of sixty tons, and not having a British register, to be piloted and conducted without having a duly licensed pilot on board, upon the same terms and conditions as are by this act imposed on British ships and vessels, not exceeding the like burthen. The master or owner of any ship or vessel also may employ any person or persons whomsoever as a pilot or pilots in and for the assistance of a ship or vessel in distress, or in consequence thereof, or under any circumstances which shall have rendered it necessary for such owner or master to avail himself of the best assistance which at the time could be procured. So ships brought into port by a pilot, may be removed by the master, &c., for certain purposes.<sup>b</sup> The Act does not extend to the registry of H. M. ships; nor does it affect the jurisdiction of the Court of Admiralty, nor that of the High Court of Admiralty; nor the rights of the City of London; nor those of any districts having separate jurisdictions.

The Act also contains rates of pilotage.

Having thus given some of the principal clauses of the 6 Geo. 4, c. 125, and noted the judicial decisions upon it; it only remains to say a word or two upon the more recent acts of parliament upon the same subject, viz, the 9 Geo. 4, c. 86, the 3 and 4 Vict., c. 68, the 2 and 13 Vict, c. 88, and the 16 and 17 Vict, c. 129. The last act wholly repeals the 9 Geo. 4, c. 86; unites the *Cinque Port* Pilots with the Trinity House; and amends the 12 and 13 Vict., c. 88, which enables the master or mate to pilot his own ship. The 3 and 4 Vict., c. 68, was, "to enable H. M. in council to authorize ships and vessels belonging to countries having treaties of reciprocity with the U. K., to be piloted, in certain cases, without having a licensed pilot on board; and also to regulate the mode in which pilot-boats shall be painted and distinguished."

Rates of  
pilotage.

<sup>a</sup> See n. (c.) last page.

<sup>b</sup> See *Lucey v. Ingram*, 6 M. & W. 313.

*Abbott on  
Shipping.*

## CHAPTER VIII.

### CONVEYANCE OF PASSENGERS BY SEA.

**Emigration.** THE tide of emigration has set so strong from our shores, to every part of the globe, that the conveyance of passengers by sea, at all times of importance, has become, of late, immeasurably more so. The merchant's difficulty, in finding ships equal to the demand, is only equalled by the anxiety of the legislature to provide for the safety and welfare of the adventurous emigrant. A consideration of a few of the leading clauses of the *The Passengers' Act* 1852 (15 and 16 Vict., c. 44),<sup>a</sup> must satisfy all that their labours are not altogether in vain.

**Passengers' Act 1852.** This important statute begins by repealing *The Passengers' Act* 1849, and the 14 and 15 Vict., c. 1. It then proceeds to define some of the terms used in the act:—as that the term *statute adult* shall signify a passenger of the age of 14 years or upwards, or two passengers above the age of one year and under that of 14; the term *passage* shall include all passages except cabin passages; the term *passengers* shall include all passengers except cabin passengers, and except labourers under indenture to the Hudson's Bay Company, and their families, if conveyed in ships the property of or chartered by the said company, and no persons shall be deemed cabin passengers unless the space allotted to their exclusive use in the chief or second cabin shall be in the proportion of at least 36 clear square feet to each statute adult, nor unless they shall be messed at the same table with the master or first officer of the ship, nor unless the fare contracted to be paid by them respectively shall be in the proportion of at least 20s. for every week of the length of the voyage, as computed for sailing vessels under the provisions of the Act; the term *passenger deck*, shall signify the main deck and the deck immediately below it, not being an orlop deck, or either of them, or any compartment thereof in which passengers may be berthed; the term *ship* shall signify any description of sea-going vessel, whether British or foreign; the term *passenger ship* shall signify every description of such ship carrying upon any voyage to which the provisions of the Act shall extend a greater number of passengers, when propelled by sails, than in the proportion of one statute adult to every 25 tons of the registered tonnage of such ship, and when propelled by steam than in the proportion of one statute adult to every 10 tons of the registered tonnage of such ship; and the Act extends to every passenger ship proceeding on any voyage from the U. K., to any place out of Europe, and not being within the Mediterranean Sea, and on every colonial voyage as therein described, but not any of H. M.'s ships of war, &c.

**To what vessels and voyages it extends.**

**Who to carry it into execution.**

It then empowers the Commissioners of Emigration to carry the

<sup>a</sup> See 16 & 17 Vict. c. 84, which amends. s. 12.

Act into execution by the style of the *Colonial Land and Emigration Commissioners*, and enacts that the master of every ship, whether a *passenger-ship* or otherwise, fitting or intended for the carriage of passengers, must afford to the proper officer at any port or place in H. M.'s dominions, and, in the case of British ships, to H. M.'s consul at any foreign port or place at which such ships shall be or arrive, every facility for inspecting such ship, and for communicating with the passengers, and for ascertaining that the provisions of the Act, so far as the same may be applicable to such ships, have been duly complied with.

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*Passengers' Act.*

Master to afford facilities for inspection of ship.

It then provides that no ship fitted or intended for the carriage of passengers as a *passenger-ship* shall clear out or proceed to sea until the master thereof shall have obtained from the emigration officer, at the port of clearance, a *certificate* under his hand that all the requirements of the Act, so far as the same can be complied with before the departure of such ship, have been duly complied with, nor until the master shall have joined in executing such bond to the Crown as required by the 59th section of the Act.

Ship not to clear out without certificate, &c.

As to the arrangements for the ship, it provides that the passengers are to be carried only on the *passenger decks*, and the number is to be limited both by tonnage and space (that is to say), if the ship is not intended to pass within the tropics, twelve clear superficial feet for every statute adult; but if the ship is intended to pass within the tropics, fifteen such clear superficial feet for every statute adult; nor (unless the ship be propelled by steam) can it clear out or proceed to sea with a greater number of persons on board (including the master and crew, and cabin passengers, if any, and counting two children above the age of one year and under that of fourteen as one person), than in the proportion of one person to every two tons of the registered tonnage of such ship. Vessels carrying passengers between the ports of *Ceylon* and those of the territories of the E. I. Co, which lie between the *Gulf of Manar* and *Palks Straits*, are exempted from this clause, but the governor and legislative council of *Ceylon* may, by ordinance, regulate the number of passengers in such ships' voyages.<sup>a</sup> The master, before demanding a clearance for such ship, must sign two lists, correctly setting forth the name and other particulars of the ship, and of every passenger on board thereof; and the lists, when counter-signed by the emigration officer, where there is one at the port, shall be delivered by the master to the officer of the customs from whom a clearance of the ship shall be demanded, and such officer shall thereupon also countersign and return to the master one of such lists, called *The Master's List*; and the master shall exhibit such last-mentioned list, with any additions which may, from time to time, be made thereto, as hereinafter directed, to the chief officer of H. M.'s customs at any port or place in H. M.'s possessions, or to H. M.'s consul at any foreign port at which the passengers or any of them shall be landed, and shall deposit the same with such chief officer of customs, or such consul, as the case may be, at the final port or place of discharge. So lists of additional passengers taken on board after clearance are to be made out, and signed by the master.

Number of passengers and where to be carried.

Lists of passengers, &c.

<sup>a</sup> 16 & 17 Vict. c. 84.

|                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Abbott on Shipping.</i>                           | If any person be found on board any passenger ship, with intent to obtain a passage therein without the knowledge and consent of the owner, charterer, or master thereof, such person, and every person aiding and abetting him in such fraudulent intent, is liable, on summary conviction, to a penalty of 5 <i>l</i> .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <i>Passengers' Act.</i>                              | Again, all passenger-ships must be surveyed before clearing out. The survey is made at the expense of the owner or charterer thereof, by two or more competent surveyors, appointed by the Colonial Land and Emigration Commissioners for each port at which there may be an emigration officer, and for other ports by the commissioners of customs. If she be not seaworthy or not fitted for her intended voyage, as to the arrangement and size of berths, light, ventilation, boats, life-boat, fire-engine, water-tanks, water, provisions, and the like, the report will be made accordingly.                                                                                                                                                                                                                                                                                                   |
| Persons fraudulently attempting to obtain a passage. | She must also be manned with an efficient crew to the satisfaction of the officer from whom a clearance of such ship may be demanded.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Ship to be properly manned.                          | No such ship can clear out or proceed to sea if there shall be on board as cargo any horses, cattle, gunpowder, vitriol, lucifer matches, guano, green hides, or any other article, whether as cargo or ballast, which, by reason of its nature or quantity shall be deemed by the emigration officer at the port of clearance likely to endanger the health or lives of the passengers, or the safety of the ship; and the                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Articles prohibited as cargo and ballast.            | cargo and stores are not to be carried on deck, except in certain cases and under certain conditions.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Deck cargo.                                          | Every passenger ship, carrying as many as 100 <i>statute adults</i> , shall have on board a passengers' steward, approved by the emigration officer at the port of clearance, to be employed in messing and serving out the provisions to the passengers, and in assisting to maintain cleanliness, order, and good discipline among the passengers, and who shall not assist in any way in navigating or working the ship.                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Passengers' stewards.                                | Also when carrying as many as 100 <i>statute adults</i> she shall have on board one, and when more than 400, two seafaring men, who shall be employed in cooking the food of the passengers.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Cook.                                                | In some cases interpreters must be carried.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Interpreters.                                        | Every <i>passenger-ship</i> shall carry a duly qualified medical practitioner in the following cases, who shall be rated on the ship's articles:—1, when the duration of the intended voyage, as hereinbefore computed, exceeds 80 days in the case of ships propelled by sails, and 45 days in the case of ships propelled by steam-engines, and the number of persons on board (including cabin-passengers, officers, and crew) exceeds 50. 2, when the intended voyage is to N. America, and the number of passengers exceeds 100 <i>statute adults</i> , and the space allotted to such passengers on the <i>passenger-decks</i> is less than 14 clear superficial feet for each <i>statute adult</i> . 3, when, whatever may be the destination of the ship, or the space allotted to the passengers, the number of persons on board (including cabin-passengers, officers and crew) exceeds 500. |
| A medical man.                                       | And the owner or charterer must provide, for the use of the passengers, a medicine chest containing a supply of good medicines, instruments, and other things proper and necessary for diseases and                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Medicines.                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

accidents incident to sea-voyages, and for the medical treatment of the passengers during the voyage, including an adequate supply of disinfecting fluid or agent, together with printed or written directions for the use of the same. And none, except as hereinafter provided, can clear out until some medical practitioner, to be appointed by the emigration officer at the port of clearance, shall have inspected the medicine chest of the ship, and also all the passengers and crew about to proceed in her, and shall certify to the said emigration officer that the ship contains a sufficient supply of medicines, disinfecting fluid or agent, instruments, and other things requisite for the medical treatment of the passengers during the intended voyage, and that none of the passengers or crew appear likely, by reason of being affected by any infectious or other disease, to endanger the health of the other persons about to proceed in such vessel. Such medical inspection of the passengers may take place either on board the vessel, or, at the discretion of the said emigration officer, at such convenient place on shore before embarkation as he may appoint; and the master, owner, or charterer of the ship shall pay to such emigration officer a sum at the rate of 20s. for every 100 statute adults so examined. In case the emigration officer, on any particular occasion shall be unable to obtain the attendance of such medical practitioner, the master may clear out on receiving from the said emigration officer written permission for the purpose. Diseased passengers may be re-landed, and no such ship shall clear out or proceed to sea so long as any such diseased person shall be on board.

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Medical inspection of passengers and medicines.

Diseased passengers

As to the passengers' rights the Act provides that any passenger so e-landed, or any emigration officer on his behalf, may recover, by summary process, the whole of the passage-money. It also provides for a return of passage-money and compensation to passengers where passages are not provided for them according to contract. That is, all monies which shall have been paid by or on account of such passengers for such passage, and also such further sum, not exceeding 10*l.* in respect of each such passage, as shall, in the opinion of the justices of the peace who shall adjudicate on the complaint, be a reasonable compensation for the loss or inconvenience occasioned to each such passenger by the loss of such passage. If any ship, whether a *passenger ship* or otherwise, shall not actually put to sea, and proceed on her intended voyage on the day appointed for sailing in and by any contract made by the owner, charterer, or master of such ship, or by his or their agent, with any passenger who shall on that day be on board the same, or ready to go on board, the owner, charterer, or master of such ship, or his or their agent, or any of them, at the option of such passenger or emigration officer, shall pay to every such passenger (or if such passenger shall be lodged and maintained in any establishment under the superintendence of the said Colonial Land and Emigration Commissioners, then to the emigration officer at the port of embarkation), subsistence money after the rate of one shilling for each statute adult in respect of each day of delay, until the final departure of such ship on such voyage. If any such ship be unavoidably detained, either by wind or weather, and

Return of passage-money where passage not provided according to contract.

As to subsistence in case of detention.



- Abbott on Shipping.* the passengers be maintained on board in the same manner as if the voyage had commenced, no such subsistence money is payable. If any *passenger ship*, after clearance, be detained in port for more than seven days, or put into or touch at any port or place in the U. K.
- Passengers' Ad.* she shall not put to sea again until there shall have been laden on board, at the expense of the owner, charterer, or master of such ship, such further supply of pure water, wholesome provisions of the requisite kinds and qualities, and medical stores, as may be necessary to make up the full quantities of the articles required for the use of the passengers during the whole of the intended voyage, nor until any damage she may have sustained shall have been effectually repaired, nor until the master of the said ship shall have obtained from the emigration officer or his assistant, or, where there is no such officer, or in his absence, from the officer of customs at such port or place, a certificate to the same effect as the certificate hereinbefore required to enable the ship to be cleared out; and in case of any default herein the master shall be liable, on conviction, to a penalty not exceeding 100*l.* nor less than 50*l.*, and ships putting back must be reported to the emigration officer. If any *passenger ship*, from disaster at sea or any other cause whatsoever, put into any port or place within the U. K. and shall not be made sound and seaworthy, and within six weeks again proceed with her passengers on her intended voyage, the owner, charterer, or master thereof must provide the passengers with a passage in some other eligible ship to the port or place at which they respectively may have originally contracted to land, and must in the meantime, if the passengers be not lodged and maintained on board in the same manner as if the ship were at sea, pay to such passengers (or if such passengers shall be lodged and maintained in any establishment under the superintendence of the said Colonial Land and Emigration Commissioners, then to the emigration officer at such port or place,) subsistence money after the rate of 1*s.* for each statute adult in respect of each day of delay until such passengers are duly forwarded to their destination. In default, passengers may recover passage money by summary process. The emigration officer may, if he think it necessary, direct that the passengers shall be removed from such *passenger ship* at the expense of the master; and if, after such direction, any passenger refuse to leave the ship he shall be liable, on conviction, to a penalty not exceeding 40*s.* or to imprisonment not exceeding one calendar month. A secretary of state, governor, or consul may pay expenses of taking off passengers at sea. So governors or consuls may send on ship-wrecked passengers, if the master of the ship fail to do so, and all expenses so incurred are to be a crown debt; but if any such passenger be forwarded he shall not be entitled to the return of his passage-money, or to any compensation for loss of passage.
- Wrongfully landing passengers.* No passenger in any ship, whether a *passenger ship* or otherwise, can be landed without his previous consent, at any port or place other than the port or place at which he may have contracted to land. And every passenger in a *passenger ship* is entitled, for

least 48 hours next after his arrival at the end of his voyage, to be kept in the ship, and to be provided for and maintained on board thereof, in the same manner as during the voyage, unless within that period the ship shall quit such port or place in the further prosecution of her voyage.

Nothing contained in the Act takes away or abridges any right of action which may accrue to any passenger in any ship, or to any other person, in respect of the breach or non-performance of any contract made or entered into between or on behalf of any such passenger or other person, and the master, charterer, or owner of any such ship, or his or their agent, or any passage broker.

The emigration commissioners must prepare an abstract of the Act and orders in council, which is to be posted up in each ship, under a penalty on the master for neglect, and on any person defacing the same.

The sale of spirits is strictly prohibited in passenger ships.

*The passage brokers*, an important and numerous class, are the next objects of its regulations. It declares, that no person can act as a passage broker without a licence. Any person wishing to obtain a licence to act as a passage broker in respect of passages from the U. K. to any place out of Europe, and not being in the Mediterranean Sea, may make application for the same to the justices at the next Sessions held for the district or place in which such person shall have his place of business. And upon granting such licence the justices must cause a notice thereof to be transmitted to the Colonial Land and Emigration Commissioners at their office in London.

In Scotland, application is to be made to the sheriff or steward or sheriff substitute or steward substitute. If any owner, charterer, master of a ship, or any passage broker or agent, or other person, receive money from any person for or in respect of a passage or intended passage from the U. K. to any port or place out of Europe, and not being within the Mediterranean Sea, the person so receiving such money shall give to the party from whom the same shall have been received, a *contract ticket* in plain and legible characters, and made out upon a printed form, which shall be in all respects according to the Form in the schedule (H.) annexed to the Act, or according to such other Form as may from time to time be prescribed by the Colonial Land and Emigration Commissioners; and shall also comply with all the directions contained on the face of such form, and in default thereof shall be liable to a penalty, not exceeding 10*l.* or less than 5*l.*, in respect of each passenger on account of whose passage such money shall have been received. The contract ticket Stamp is not liable to any *stamp duty*.

The trustees of docks may pass bye-laws for regulating the landing and embarkation of intending emigrants, and for licensing emigrant porters. Such bye-laws to be approved by a secretary of state, and published in the "London Gazette."

All penalties and forfeitures imposed by the act shall be sued for by the U. K. by any emigration officer or his assistant, or by any collector or Comptroller of H. M.'s Customs, or by any other officer of H. M.'s Customs authorized in writing by the Commissioners of

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*Passengers' Act.*

Passengers to be maintained for 48 hours after arrival.

Passengers' right of action preserved.

Posting abstract of Act.

Sale of spirits.

Passage brokers.

Contract tickets for passengers.

Regulating landing, &c. of passengers.

Recovery of penalties.

*Abbott on  
Shipping.  
Passengers'  
Act.*

and of pas-  
sage and  
subsistence  
money, and  
compensa-  
tion.

Passenger  
suing, a  
competent  
witness.  
Tender of  
amends.

Notice of  
action.

Limitation  
of legal pro-  
ceedings  
generally.

H. M.'s Customs to sue for penalties and forfeitures under the act, and in any of H. M.'s possessions abroad by any government emigration agent, or by any such Collector or Comptroller of Customs, or other officer of customs so authorized as aforesaid, or by any officer authorized to sue for penalties and forfeitures under the act by writing under the hand and seal of the governor of any such possession, and the Commissioners of H. M.'s Customs. And all sums of money made recoverable by the act as return of passage-money, subsistence-money, or compensation, may be sued for and recovered by and for the use of any passenger entitled thereto under the Act, or by any of such officers as aforesaid, for and on behalf and to the use of any such passenger or any number of such passengers respectively, and in any case either by one or several informations or complaints; and all penalties and sums of money by the Act made recoverable shall and may be sued for and recovered before any two or more justices of the peace acting in any part of H. M.'s dominions or possessions in which the offence shall have been committed or the cause of complaint shall have arisen, or in which the offender or party complained against shall happen to be, or acting in any county or borough or place adjacent to any navigable river or inlet of the sea on which such offence shall have been committed or cause of complaint have arisen. Upon information or complaint made before any one justice of the peace acting as aforesaid, he issues a summons or grants his warrant as the case may be. Every police or stipendiary magistrate, and in Scotland, every sheriff or steward and sheriff substitute or steward substitute of a county or stewartry within his own county or stewartry, has the like powers. A passenger suing for any passage-money, subsistence-money, or compensation, is a competent witness in any proceeding for the recovery thereof, notwithstanding the same, if recovered, shall be applicable to his own use and benefit. No person can recover in action against any emigration officer, his assistant, government emigration agent, or officer of customs, or other person, for anything done in pursuance of the Act, if tender of sufficient amends shall have been made before action brought, or if, after action brought, a sufficient sum of money has been paid into court. Moreover, no action or suit can be commenced against any emigration officer, his assistant, government emigration agent, or officer of customs, or other person, for anything done in pursuance of or under the authority of the Act, until ten clear days' notice has been given thereof in writing to him. Where no time is expressly limited within which any complaint or information is to be made or laid for any breach or nonperformance of any of the requirements of the Act, the complaint must be made or the information laid within 12 calendar months from the time when the matter of such complaint or information respectively arose, or in case the master of any ship is the offender or party complained against, within 12 calendar months next after his return to the country in which the matter of complaint or information arose.

These are the main regulations regarding ships and persons going abroad from this country.

The Statute after this proceeds to regulate *colonial voyages*: and it begins, as before, by saying, that the term *colonial voyage* shall signify any voyage from any port or place within any of such possessions (except the territories under the government of the E. I. Co.) to any port or place whatever, of which the duration, as hereinafter mentioned, shall exceed three days. The Act is to apply, so far as the same is applicable, to all ships carrying passengers on any such *colonial voyage*, except as to such parts of the Act as relate to passage brokers and their licences; to passengers' contract tickets; to the giving bond to Her Majesty; to the keeping on board a copy of the Act; and to orders in council prescribing rules for cleanliness, order, and ventilation. If the prescribed duration of any *colonial voyage* be less than three weeks, then in addition to the matters lastly excepted, the provisions of the Act are not to extend or apply, so far as they relate to the following subjects: namely, the construction or thickness of the decks; the berths and berthing; the height between decks; privies; hospitals; light and ventilation; nanning; passengers' stewards; passengers' cooks and cooking apparatus; the surgeon and medicine chest; and the maintenance of passengers for 48 hours after arrival. Also in the case of such *colonial voyages*, whereof the prescribed duration is less than three weeks, the requirements of the Act respecting the issue of provisions shall not, except as to the issue of water, be applicable to any passenger who may have contracted to furnish his own provisions. The governor of colonies may, by proclamation, declare length of voyage, and substitute other articles of food and medicine, and provide for survey of ships in the colonies, and appoint surgeons hereto. The governor-general of India in council, by an act to be passed for that purpose, may adopt the act for India, and make rules respecting food, passengers, &c., and may declare in what manner penalties, &c. may be sued for and recovered; and the Indian Act may be enforced in the colonies in like manner as this Act.

Lastly, it regulates voyages *into* the U. K. It declares that the master of every ship bringing passengers *into* the U. K. from any port or place out of Europe shall, within 24 hours after arrival, deliver to the emigration officer or his assistant, or in their absence to the chief officer of customs at the port of arrival, a correct list signed by such master, and specifying the names, ages, and callings of all the passengers embarked, and also the port or ports at which they respectively may have embarked, and showing which, if any of them, may have died or have been born on the voyage; and if any master shall fail so to deliver such list, or if the same shall be wilfully false, he shall, on conviction, be liable to a penalty not exceeding 50*l*. If any ship bringing passengers *into* the U. K. from any place out of Europe shall have on board a greater number of persons or statute adults than in the proportions respectively prescribed<sup>a</sup> for ships carrying passengers *from* the U. K. the master of such ship shall be liable, on such conviction, to a penalty not exceeding 5*l*. or less than 2*l*. for each such person or statute adult constituting any such excess; and the master of every passenger ship bringing

<sup>a</sup> Sect. 12.

*Abbott on Shipping.*  
*Passengers' Act.* passengers into the U. K. from any place out of Europe shall make to each statute adult during the voyage, including the time of detention, if any, at any port or place before the termination thereof, issues of pure water and of good and wholesome provisions in a sweet condition, in quantities not less in amount than is prescribed in the Act<sup>a</sup> for passengers proceeding from the U. K.; and in case of any default herein, the master of such ship shall, on such conviction, be liable for each offence to a penalty not exceeding 50*l*.

The *Schedule* annexed to the Act contains, amongst other things, a form of bond to be given by the owner or charterer, and by the master; forms of a *passage broker's annual bond*; *broker's licence*; and of a passengers' *contract tickets*; but as every lawyer has easy access to them in the statute book, and as the merchant and emigrant may buy them printed at almost every port, not to mention the requirements of the Act itself as to the means to be taken for making it known, I proceed to another subject, of no less importance to the community at large, namely, *The Steam Navigation Act, 1851*.

## CHAPTER IX.

### STEAM NAVIGATION.

STEAM-POWER has, within the last thirty years, revolutionized the world. Pestilence or war may have undone more in a shorter time, but in peace, since the world began, never was there such a mighty change. Reason almost stands perplexed at the magnitude of the operations. Yet here again, with pride I say it, has the Legislature of this country been found more than equal to its high functions. It has boldly grappled with the subject, and it has, at length, succeeded in moulding into admirable form the great commercial interests called into play.

The important Act meant is *The Steam Navigation Act, 1851* (14 & 15 Vict., c. 79). It is a *consolidation Act*. After repealing the 9 & 10 Vict., c. 100, and the 11 & 12 Vict., c. 81, it directs the naval department of the Board of Trade to assist the Lords of the Committee of Privy Council for Trade in the execution of it. It should be premised, however, that it is not to apply to any of H. M.'s ships, nor to any vessel not being a *British* vessel, nor to a vessel owned wholly or in part by *British* subjects, nor to any steam floating bridge. It provides that steam-vessels must be surveyed and owners must transmit declarations to the Board of Trade twice a year. Upon the receipt of the declarations the Board of Trade is to register the vessel, and to grant certificates and transmit lists, to be put up at custom-houses. It may cancel certificates and require fresh

<sup>a</sup> Sect. 32.

declarations. The owner or master of every steam-vessel must forthwith on receipt of any such certificate by him or his agent cause the same or a true copy thereof, in distinct and legible characters to be put up in some conspicuous part of the vessel, and no steam-vessel can proceed on any voyage without such certificate, and no officer of the customs must clear out, &c., any steam-vessels, but upon production of such certificate. Severe penalties are imposed on the owner, &c., for carrying more passengers than specified in such certificate; on persons forcing their way on board when vessels are full; on persons refusing to pay their fares or to quit the vessel; and on offenders refusing to give their name and address. The Board of Trade is to appoint and remove shipwright surveyors, &c., and fix rates of remuneration. These surveyors are to make returns of the build, &c., of vessels; and owners, &c., are to give information for that purpose. They are to act under the direction of the Board of Trade, and are to be allowed to go on board steam vessels, to inspect, &c. Iron steamers are to be divided by water-tight partitions, and the officers of customs are not to grant certificates except they be so divided. Steam-vessels must carry safety-valves out of the control of the engineer. Sea-going vessels must be provided with the number of boats and of the dimensions mentioned in the Act; also with life-boats, life-buoys, hose, lights, signals, &c., under heavy penalties. By sect. 26, the Admiralty is empowered to make regulations as to *lights*;<sup>a</sup> and on the 1st of May, 1852, the following orders were issued:

CHAP. IX.  
Steam Navigation Act.

Number of passengers.

Not paying fare, &c.

Surveyors.

Iron steamers.

Safety-valves.

Boats, &c.

Lights.

"Admiralty notice respecting lights to be carried by sea-going vessels to prevent collision. By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c. By virtue of the power and authority vested in us by the Act 14 and 15 Vict., c. 79, dated the 7th of August, 1851, we hereby require and direct that the following regulations be strictly observed:—

"*Steam-vessels*: All British sea-going vessels (whether propelled by paddles or screws), shall, within all seas, gulfs, channels, straits, bays, creeks, roads, roadsteads, harbours, havens, ports, and rivers, and under all circumstances between sunset and sunrise, exhibit lights of such description and in such manner as hereinafter mentioned, viz.

"*When under steam*: A bright white light at the foremast head, a green light on the starboard side, a red light on the port side.

"1. The masthead light is to be visible at a distance of at least five miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, being ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side.

"2. The green light on the starboard side is to be visible at a distance of at least two miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to show a uniform and un-

<sup>a</sup> See *Morrison v. G. S. N. Co.* 8 Exch. 734; *G. S. N. Co. v. Morrison*, 22 L. J. C. P. 178.

*Abbott on Shipping.* broken light over an arc of the horizon of ten points of the compass, viz., from right ahead to two points abaft the beam on the starboard side.

*Steam Navigation Act.* "3. The red light on the port side is likewise to be fitted so as to throw its light the same distance on that side.

"4. The side lights are moreover to be fitted with screens on the inboard side of at least three feet long, to prevent the lights from being seen across the bow.

"*When at anchor:* a common bright light.

"*Sailing Vessels:* We hereby require, that all sailing vessels, when under sail or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision. All sailing vessels at anchor in roadsteads or fairways shall be also bound to exhibit, between sunset and sunrise, a constant bright light at the masthead, except within harbours or other places where regulations for other lights for ships are legally established. The lantern, to be used when at anchor both by steam vessels and sailing vessels, is to be so constructed as to show a clear good light all round the horizon.

"We hereby revoke all regulations heretofore made by us relating to steam-vessels exhibiting or carrying lights; and we require that the preceding regulations be strictly carried into effect on and after the 1st of August, 1852. Given under our hands the 1st of May, 1852."

Rules to be observed by vessels passing each other.

The *Trinity House* rule then follows in the Act, in these words:

"Whenever any vessel proceeding in one direction, meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and to the position of each vessel, with respect to the dangers of the channel, and as regards sailing vessels, to the keeping of each vessel under command; and the master of any steam-vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam-vessel neglect to observe these regulations, or either of them, he shall for every such offence be liable to a penalty not exceeding 50%."\* "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the nonobservance either of the foregoing rules with respect to the passing of steamers or of the rules to be made as aforesaid by the Lord High Admiral or the commissioners for executing the office of Lord High Admiral with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompence whatsoever for any damage sustained by such vessel in such collision, unless it appears to the court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule; and in case any damage to person or property be sustained in consequence of the nonobservance

Owners not entitled to compensation in certain cases of collision, but master to be liable to penalty.

\* Sect. 27.

of any of the said rules, the same shall in all courts of justice be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having the charge of such vessel, and such master or other person shall, unless it appears to the court before which such case is tried that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings, whether civil or criminal, to the legal consequences of such default." <sup>a</sup> There is a wide-spread notion among sailors, above all, on board *Thames* steamers, that if the helm be a-port when a collision takes place, the vessel which has its helm a-port is by the rule in the last page under all circumstances justified; and thus, by a mistaken notion of its meaning, masters often run into the very mischief it was intended to prevent. The side of the road is no criterion of negligence, neither is the side of the helm. The meaning of the rule is this: when a collision is imminent, each vessel is to port its helm. Its object is to teach beforehand what is to be done in the moment of imminent peril or unavoidable necessity, in order to break the force of a blow which must come, and to provide for as little damage as human foresight can, under the circumstances. To any other state of things the rule has little or no application. On the other hand, bargemen contend that if a barge is manned as a barge was before the introduction of steamers, that they have a sort of prescriptive right to man a barge so now, whether sufficiently manned or not, according to the present altered state of navigation; I know of no rule of law to justify this position. Accidents must be reported to the Board of Trade, and notice given of apprehended loss of steam-vessels. <sup>b</sup> With regard to the provision to be made for the inspection of steam-vessels it enacts that the Board of Trade may send inspectors on board vessels whenever necessary. These inspectors have ample powers given them to discharge their duties.

CHAP. IX.

Steam Navigation Act.

Meaning of the Trinity-house rule.

Accidents to be reported.

Inspection of steam-vessels.

Recovery of penalties.

The proceedings for the recovery of penalties, &c., are substantially the same as in the foregoing chapter.

## THE CARRIAGE OF GOODS IN MERCHANT SHIPS.

### CHAPTER X.

#### OF THE CONTRACT OF AFFREIGHTMENT BY CHARTER-PARTY.

THE contract by charter-party, of which it is here intended to treat, is, as I have before observed, a contract, by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. A ship

<sup>a</sup> Sect. 28. *Morrison v. G. S. N. Co.*, 22 L. J. C. P. 178.  
Co. 8 Ex. 733; *G. S. N. Co. v. Morrison*.

<sup>b</sup> Sect. 30.



*Abbott on  
Shipping.*

Charter-  
party,  
origin of the  
word.

may indeed be let for other purposes, as to be employed in warfare, or the fishing, coasting, or other trade, under the entire management of the hirer; or by way of mortgage, reserving at least a temporary right of management to the letter; or one part-owner may let his own share to another. But contracts of this nature do not form the subject of the present enquiry. The term charter-party is generally understood to be a corruption of the Latin words *charta partita*.<sup>a</sup> The two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other, as evidence of their original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design, indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of Indenture. This practice of division, however, has long been disused, and that of indentation has become a mere form. I propose in the present chapter to consider the modes in which this contract may be made, and to mention the usual stipulations contained in a charter-party, and some particular covenants, that have furnished occasion for the decision of a court of justice: reserving the consideration of the general duties, that arise as well out of the contract for conveyance in a general ship, as of this species of contract, for distinct chapters hereafter.

By whom  
executed.

By master,  
who to sue  
on.

This instrument, when the ship is let at the place of the owners' residence, is generally executed by them, or some of them, (and frequently by the master also), and by the merchant or his agent. In a foreign port it must of necessity be executed by the master only, and the merchant or his agent, unless the parties have an agent resident in such port, authorized to this purpose by deed or letter of attorney under seal. I have before observed, that the execution of a charter-party under seal by the master, although said to be done on behalf of the owners, does not furnish a direct action, grounded upon the instrument itself, against them. This depends upon a technical rule of the law of England,<sup>b</sup> applicable as well to this as to other cases, and not affected by the mercantile practice of executing deeds for and in the name of absent persons: the rule of the law of England being, that the force and effect which that law gives to a deed under seal, cannot exist, unless the deed be executed by the party himself, or by another for him, in his presence, and with his direction; or, in his absence, by an agent authorized to do so by another deed: and in every such case the deed must be made and executed in the name of the principal. The agent, indeed, either of the owner or merchant, may, and sometimes does, execute a charter-party, and covenant in his own name for performance by his principal, so as to bind himself to answer for his principal's default, by force of the deed. Another technical rule of the law of England, applicable also to the contract by charter-party, should be noticed in this place. If a

<sup>a</sup> Hargrave's n. Co. Litt. 229; and see Pothier, *Traité de charte-partie*, N. 1.

<sup>b</sup> *Harrison v. Jackson*, 7 T. R. 207; *Horsley v. Rush* (the case of a charter-party) there cited.

charter-party is expressed to be made between certain parties, as between A and B, owners of a ship, whereof C is master of the one part, and D and E of the other part, and purports to contain covenants with C, nevertheless C cannot bring an action in his name upon the covenants expressed to be made with him, nor give a release of them, even although he seals and delivers the instrument.<sup>a</sup> But if the charter-party is not expressed to be made between parties, but runs thus: This charter-party indented witnesseth, that C, master of the ship W, with consent of A and B, the owners thereof, lets the ship to freight to E and F, and the instrument contains covenants by E and F, to and with A and B; in this case A and B may bring an action upon the covenants expressed to be made with them; although, unless they seal the deed, they cannot be sued upon it.<sup>b</sup> This latter, therefore, is the most proper form.

The authorities are collected in 1 Ch. Pl. 3 (6th Edit). That able pleader adds, a position strengthened by a host of authorities, that if the charter-party be *not under seal*, the party, for whose benefit the stipulation is expressed to be, may sue in his own name, although it be not made directly to or with him. And see *Drake v. Beckham*, 11 M. & W. 315; 2 H. of L. Ca. 579, S. C. The question of law often arises in our courts, whether the charter-party itself must be declared on? The answer is the same as in other cases:—viz., if there be an instrument in writing between the same parties respecting the same matter, it must be declared on. If the cause of action be collateral to, or not inconsistent with, the terms of the charter-party, the declaration need not be framed upon it.<sup>c</sup>

By this contract a ship is let for a voyage to one or more places: the freight is expressed to be a sum of money, for the entire ship, or an entire part of the ship, or for each ton or other portion of its capacity; and this sum is again either a gross sum for the whole voyage or voyages, or a particular sum for every month or week of the ship's employment; sometimes, also, the freight is expressed to be a certain sum for every ton, cask, or bale of goods put on board, in which case, the merchant usually covenants not to put on board less than a specified number of tons, casks, or bales; and where the payment is to be by the ton of goods, it is usual and proper to add, *and so in proportion for a less quantity than a ton*, as it was formerly decided in a case where these words were omitted, that the owner could recover nothing for a hogshead.<sup>d</sup> These variations in the mode of paying the freight have given rise to some questions and decisions on that article, which will be more properly noticed in the chapter on Freight. The merchant, who has so hired a ship, may lade it either with his own goods, or if he has not sufficient, may take in goods of other persons; or he may wholly underlet the

CHAP. X.

How to declare.

Whose goods to be put on board.

<sup>a</sup> *Scudamore v. Vandenslene*, 2 Inst. 673; *Storer v. Gordon*, 3 M. & S. 308.

<sup>b</sup> *Cooker v. Child*, 2 Lev. 74, and see *Gilby v. Copley*, 3 Lev. 138.

<sup>c</sup> *Lealie v. Wilson*, 3 B. & B. 171; *Atty v. Parish*, 1 N. R. 104; *Hunter v.*

*Prinsep*, 10 East, 378; *Splidt v. Bowles*, 10 Ib. 279; *Morrison v. Parsons*, 2 Taunt. 407; see also *Hutton v. Warren*, 1 M. & W. 474; *Shepherd v. Pybus*, 4 Sc. N. R. 446.

<sup>d</sup> *Rea v. Burnis*, 2 Lev. 124.

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Shipping.*

Burthen.

Usual stip-  
ulations.

ship to another. By the French Ordinance (1681),<sup>a</sup> underletting at an advanced price is prohibited: a wise regulation, though not adopted by our law;<sup>b</sup> and perhaps not rendered necessary by the practice of our merchants. If it is necessary, a clause may easily be introduced into all charter-parties to prevent the practice. The charter-party usually expresses the burthen of the ship,<sup>c</sup> and by the French Ordinance (1681)<sup>d</sup> it is required to do so. A mistake in the amount of the burthen may in some cases be prejudicial to one party or the other.<sup>e</sup> The French Ordinance<sup>f</sup> provides that the master, who declares his ship to be of a burthen exceeding the truth, shall answer the merchant in damages, but that an error shall not be deemed to exist, unless it exceeds a 40th part. According to Molloy, if a ship be freighted by the ton, and found of less burthen than expressed, the payment shall be only for the real burthen.<sup>g</sup> And if a ship be freighted for (say) 200 tons, or *thereabouts*, the addition of *thereabouts*, says the same author, is commonly reduced to be five ton more or less. The wise provisions of the statutes for registering British ships will probably prevent any mistake in this matter, and certainly furnish the means of detecting a wilful misrepresentation. The contents of the charter-party are varied according to the nature of the intended voyage, or the will of the parties; but the usual stipulations on the part of the owner, or master, are, that the ship shall be tight and staunch, furnished with all necessaries for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board. That, after lading, she shall sail with the first fair wind and opportunity to the destined port (the dangers of the seas excepted) and there deliver the goods to the merchant or his assigns in the same condition they were received on board; and further that during the course of the voyage the ship shall be kept tight and staunch, and furnished with sufficient men and other necessaries, to the best of the owner's endeavours. On the other hand, the merchant usually covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port; and to pay the freight in the manner appointed. It is usual also for each of the parties to bind himself, his heirs and executors, and the owner or master the ship and her freight, and the merchant the cargo to be laden, in a pecuniary *penalty* for the true performance of their respective covenants. Frequently, also, it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay and the payment to be made for it are both called *demurrage*.<sup>h</sup> Sometimes, also, particular clauses are introduced in favour of the owners, to take away their responsibility for embezzlement of the master, or other matters, for which they would otherwise be

<sup>a</sup> Liv. 3, tit. 3, Fret. art. 27.

<sup>b</sup> *Michenson v. Begbie*, 6 Bing. 193.

<sup>c</sup> See *Straccha de Nav.* pt. 3, no. 4.

14.

<sup>d</sup> Liv. 3, tit. 1, *Charte-partie*, art. 3.

<sup>e</sup> See *Hunter v. Fry*, 2 B. & A. 421;

and *Bishop v. Macintosh*, 2 B. & C. 556.

<sup>f</sup> Liv. 3, tit. 3, Fret. art. 4 and 5.

<sup>g</sup> Molloy, b. 2, ch. 4, s. 8.

<sup>h</sup> *Post*, p. 170.

answerable. But although the ship and freight are by the terms of the charter-party expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet, as I have before observed, there does not appear to be at present any mode of obtaining the benefit of the security of the ship itself *in specie* in this country.<sup>a</sup> Neither can the owners in all cases have the full benefit of the clause, by which the cargo is expressed to be bound to the payment of the freight and performance of the covenants on the part of the freighter or merchant.<sup>b</sup> But whoever is in possession of the ship has a *lien* on the cargo for the hire of the ship;<sup>c</sup> provided he has not waived his right by making the delivery of the goods to precede the payment of the hire.<sup>d</sup> Whether the general owner or the merchant-charterer is in possession of the ship is a question to be decided, in each case, by the language of the charter-party.<sup>e</sup> Its language must be very strong to deprive the general owner of it. I need scarcely say that the goods of others than the charterer, can only be detained for the sum agreed to be paid to him, or the freight mentioned in the bill of lading.<sup>f</sup> Neither the bankruptcy of the charterer, nor any assignment nor pledge made by him of the cargo, can defeat this right of lien. When the payment was to be made by approved bills, and the owner objected to one delivered to him, but afterwards negotiated it, it was held, that he thereby lost the benefit of his objection, and his right to detain the goods.<sup>g</sup>

In all maritime transactions expedition is of the utmost importance, for even by a short delay the season or object of the voyage may be lost; and therefore, if either party is not ready by the time appointed for the loading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained. Nay, according to Molloy, even if part of the lading be put on board, and the merchant cannot furnish the residue, the owner may annul the contract, and lade his ship with other goods; but the same author adds, that it is by no means prudent to do so without good reason and deliberation.<sup>h</sup> I apprehend the author, who here alludes to a covenant to furnish an entire lading, must be understood to speak of a part insufficient in value to answer the freight engaged to be paid; for if goods of the merchant who hires the ship, sufficient in value to answer such freight, be put on board, it seems reasonable that the merchant, upon whom the loss of the deficiency will fall, should have the right to take the loss upon himself, and order the ship to sail. And accordingly the French Ordinance (1681),<sup>i</sup> directs that if the ship be freighted by the great, and the merchant do not furnish a full lading, yet the

<sup>a</sup> *Ante*, p. 135; see also *Faith v. E. I. Co.* 4 B. & A. 630; *Small v. Moates*, 9 Bing. 574; *Gladstone v. Birley*, 2 Mer. 401.

<sup>b</sup> *Paul v. Birch*, 2 Atk. 621; *Mitchell v. Seaife*, 4 Camp. 298.

<sup>c</sup> *Saville v. Campion*, 2 B. & A. 503; *Tate v. Meek*, 8 Taunt. 280; *Campion v. Colvin*, 3 Bing. N. C. 17; *Newberry v. Colvin*, 7 Bing. 190.

<sup>d</sup> *Ib.* and *Lucas v. Nockells*, 4 Bing.

729; *Brown v. North*, 8 Ex. 1.

<sup>e</sup> *Ib.*

<sup>f</sup> See *Gledstanes v. Allen*, 12 C. B. 202; *Mitchell v. Seaife*, *supra*.

<sup>g</sup> *Horncastle v. Farrer*, 3 B. & A. 497.

<sup>h</sup> *Molloy*, b. 2, ch. 4, s. 3.

<sup>i</sup> *Liv.* 3, tit. 3, *Fret. art.* 2; *Pothier, Charte-partie*, no. 20.

- Abbott on Shipping. master shall not, without his consent, take in other goods to complete the lading, nor without accounting to him for the freight of such goods; which direction is consonant to general principles of law; for the hirer has a right to use the thing hired in any manner most agreeable to himself, not differing from the purpose for which it was let to him. And in this particular case the sale of the merchant's goods may be prejudiced by taking other commodities to the market for which he has destined them. But as the lading is the owner's best security for the payment of the freight, if goods sufficient to answer such payment are not put on board, and the merchant is known or reasonably suspected to have become insolvent, the owner will incur no risk of damages by annulling the contract or taking other goods to secure his freight, which, if it can be done, is the better method.
- When Charter-party takes effect. A charter-party, like every other deed, takes its effect and operation from the day on which it is sealed and delivered, and not from the day on which it bears date, if different from the day of delivery, unless there be words of reference to the day of the date.
- It is reciprocal. The contract by charter-party is, in general, of that kind which the lawyers call reciprocal, that is, mutually obligatory upon each party; but, nevertheless, the parties may insert any lawful stipulations they please, and may by particular clauses, render it obligatory upon one, and optional to the other.<sup>a</sup> An intention to make any particular stipulation a *condition precedent* should be clearly expressed.
- Construction of. The general rule which our Courts of law have adopted in the construction of this as well as other mercantile instruments is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates.<sup>b</sup> The terms of a charter-party under seal cannot be varied or dispensed with by a parol agreement.<sup>c</sup> But if such a contract be to take effect from a particular time, an agreement relating to an earlier period of time will not be a variation or dispensation, and may be good and binding. Thus, where by a charter-party under seal a ship was let at a certain rate per month, to commence and be computed from the day of her departure from Gravesend, and was to take in her cargo at a port in the Channel, and sail therewith on the intended voyage, a subsequent verbal agreement for loading the ship in the Thames, and commencing the payment from the day of her clearing out at the Custom-house, was held to be binding, and the merchant was compelled to pay for the interval between clearing out and sailing from Gravesend.<sup>c</sup> The usual clauses purporting that it is covenanted and agreed by and between the parties, that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful for the freighter to detain the vessel for those purposes a further specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods, and if he does so detain her he is liable
- Evidence to explain.
- Demurrage.

<sup>a</sup> Shubrick v. Salmond, 3 Burr. 1687.

<sup>b</sup> See Anderson v. Pitcher, 2 B. & P. 164; M'Andrew v. Adams, 1 Bing. N. C. 29; Clipsham v. Vertue, 1 D. & R.

344; Bailey v. De Arroyave, 7 A. & E. 919; 1 Smith's D. C. 305.

<sup>c</sup> White v. Parkin, 12 East, 578.

to an action on the contract.<sup>a</sup> If a ship be so detained, the daily rate of demurrage mentioned in the charter-party will, in general, be the measure of the damages to be paid, but it is not the absolute or necessary measure; more or less may be payable, as justice may require, regard being had to the expense and loss incurred by the owner, and the amount must be settled by a jury, if the parties cannot agree.<sup>b</sup> Where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, for he has engaged that it shall be done.<sup>c</sup> Many vessels are now obliged by law to unlade at particular docks, as in the River Thames; and in many cases the law allows the importer to warehouse his goods at such docks for a certain time, under security given for payment of the import duties, instead of removing them into his own custody and discharging the duties immediately, which is often a matter of great convenience to the importer, and has become the usual practice. It has sometimes happened, from the great resort of vessels to these docks at particular seasons, that considerable delay has taken place in the unloading, especially where the goods were to be warehoused, and it has been questioned whether the merchant should answer for such delay; and, according to the principle above laid down, it has been twice held that he must answer, by reason of the terms of his contract. On the first occasion some stress was laid on the circumstance of warehousing the goods, it being understood that if the importer had chosen to take them from the docks immediately the delay would not have happened.<sup>d</sup> On the second occasion this circumstance does not seem to have been noticed.<sup>e</sup> But, on the other hand, where, by the terms of the contract, the merchant was to be allowed the usual and customary time to unload the vessel at her port of discharge, it was held that he was not answerable for a delay of this sort, although great part of it was owing to his election to warehouse and bond the goods, that appearing to be the usual practice with regard to cargoes of the like description.<sup>f</sup> The same law was laid down with respect to a consignee of goods sent in a general ship, without any stipulation on this subject in the bill of lading.<sup>g</sup>

Demurrage, properly so called, arises out of the terms of some contract. But if a ship be improperly detained by the merchant, the owner may, in some cases, have a special claim to damage in the nature of demurrage. The owner, however, has no claim of this sort for a delay occasioned (say) by an hostile occupation of the destined port, although after such delay it may be found expedient entirely to abandon the voyage, and thereby the whole employment of the ship becomes unprofitable, for here the merchant is in no fault.<sup>h</sup> If the

<sup>a</sup> *Randall v. Lynch*, 12 East, 179. Indeb. Ass. will not lie. *Cropton v. Pickernell*, 16 M. & W. 830.

<sup>b</sup> *Meersom v. Bell*, 2 Camp. 616.

<sup>c</sup> *Barker v. Hodgson*, 3 M. & S. 267; *Barret v. Dutton*, 4 Camp. 333; *Harman v. Clarke*, 1b. 159; *Pringle v. Mollet*, 6 M. & W. 83.

<sup>d</sup> *Struck v. Tenant*, Cor. Mansfield, Ch. J. Sit. at Guild. after T. T. 1806.

<sup>e</sup> *Randall v. Lynch*, 2 Camp. 352.

<sup>f</sup> *Rodgers v. Forresters*, 2 Camp. 483.

<sup>g</sup> *Burmester v. Hodgson*, 2 Camp. 488.

<sup>h</sup> *Liddard v. Lopes*, 10 East, 526.

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ship-owner himself be the cause of the delay, as by not getting the necessary clearances, a right to demurrage cannot arise.<sup>a</sup> The consequences of a delay caused by frost,<sup>b</sup> custom-house or dock regulations,<sup>c</sup> the cargo being prohibited to be exported by a foreign government,<sup>d</sup> quarantine laws,<sup>e</sup> or the like, fall upon the freighter, in the absence of any stipulation to the contrary. But he is not liable for delay *after the completion of the loading*.<sup>f</sup> The words *days* and *running days* are construed to mean the same thing, namely, consecutive days, in the absence of any particular custom. If the parties wish to exclude any day, as a Sunday or a holiday, it must be so expressed.<sup>g</sup> The days are, in general, to be computed from the time of the ship's arrival at the usual place of loading or unloading, and not at the port merely.<sup>h</sup> There seems to be an exception to this general rule in the case of one of two or one of several consignees, in the case of a general ship where goods are not ready for discharge at the time of the ship's arrival (not occasioned by his own default, but from the nature of the stowage or the like cause). There would seem to be allowed, in such a case, a *reasonable time* after the obstruction is removed for removing them.<sup>i</sup> It often happens that no particular number of days is mentioned in the charter-party, or bill of lading, but instead, the merchant is to be allowed the *usual and customary time*, and many difficulties are got rid of by this mode of expression.<sup>k</sup> What is a reasonable or what is the usual and customary time is matter of evidence and not of law, and therefore cannot be stated with more certainty.

There is usually inserted in the *bill of lading*, and should always be so, in the case of a general ship, words to the effect that the consignee shall clear them in a given number of days after the ship's arrival, or pay so much a day for demurrage. The person who claims and receives the goods under the bill of lading adopts these terms, and is liable to pay the sums named in the bill of lading.<sup>l</sup> It is no answer to this claim on the consignee that he had no notice of the ship's arrival, or that he did not receive the bill of lading in time, and the master insisted upon its being produced or an indemnity.<sup>m</sup>

The payment of demurrage, stipulated to be made while a ship is waiting for convoy ceases as soon as the convoy is ready to depart; and such payment, stipulated to be made while a ship is waiting to receive a cargo, ceases when the ship is fully laden and the necessary clearances are obtained, although the ship may, in either case, happen

<sup>a</sup> *Benson v. Blunt*, 1 Q. B. 878; *Barret v. Dutton*, 4 Camp. 333; and see *Furnell v. Thomas*, 5 Bing. 188.

<sup>b</sup> *Barret v. Dutton*, 4 Camp. 333; *Pringle v. Mollett*, 6 M. & W. 80.

<sup>c</sup> *Hill v. Idle*, 4 Camp. 327; *Randall v. Lynch*, 2 Ib. 356, and 12 East, 177; *Bessey v. Evans*, 4 Camp. 131.

<sup>d</sup> *Blight v. Page*, 3 B. & P. 295, n.

<sup>e</sup> *Barker v. Hodgson*, 3 M. & S. 267.

<sup>f</sup> *Pringle v. Mollett*, 6 M. & W. 80.

<sup>g</sup> *Brown v. Johnson*, 10 M. & W. 334.

<sup>h</sup> 1b. and *Kell v. Anderson*, 1b. 500.

<sup>i</sup> *Rogers v. Hunter*, 2 C. & P. 601; *Dobson v. Dreap*, 4 Ib. 112; *contra Leer v. Yates*, 3 Taunt. 387; *Harman v. Gandolph*, Holt. N. P. 35.

<sup>j</sup> *Rodgers v. Forresters*, 2 Camp. 483; *Burmester v. Hodgson*, 1b. 488.

<sup>k</sup> *Harman v. Gandolph*, Holt. N. P. 35; *Harman v. Mant*, 4 Camp. 161; *Jeason v. Solly*, 4 Taunt. 52; *Seafie v. Tobin*, 3 B. & Ad. 523.

<sup>l</sup> *Harman v. Clarke*, 4 Camp. 159; *Harman v. Mant*, 1b. 161.

to be further detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived.<sup>a</sup> It is often difficult to determine whether the parties intended a particular stipulation in the charter-party to be a *condition precedent* or an *independent covenant*. This depends not on any formal arrangement of the words, but on the reason and the sense of the thing, as it is to be collected from the whole contract. The rule is, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but when the covenants go only to a *part*, then a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.<sup>b</sup> Another rule closely connected with this is, that whenever the merchant has derived any benefit under the contract, he shall never afterwards be allowed, notwithstanding the ship-owner's neglect, to take his stand upon the condition, as he might have done if he had derived no benefit therefrom. If he has, in such a case, sustained any damage by a breach of the condition, as not loading a *complete* cargo, not making the ship seaworthy *forthwith*, or by a *day named*, not sailing with the first favourable wind, with the first convoy, or the like, the merchant is driven to his cross-action against the ship-owner for it, and he is not allowed to set it up in bar of an action to recover the stipulated freight.<sup>b</sup> The charter-parties of E. I. Co. usually contained a clause in words making the freight payable on the safe arrival of the vessel, and the like,<sup>c</sup> and many attempts were made to convert the charter-party on this clause into a policy of *insurance*.<sup>d</sup> The dispute was at length set at rest by a judgment of the House of Lords, declaring that the owner was not liable to make satisfaction for damage done to goods on board by *storm*.

CHAP. X.

Condition or covenant.

East India charter-parties.

When goods are put on board in pursuance of a charter-party, the master is to sign for them bills of lading, to the effect mentioned in the ensuing chapter. The *charter-party* being the instrument and evidence of the *contract for the conveyance*, and the *bill of lading* the evidence of the *shipping* of the particular merchandise to be conveyed in pursuance of the contract.

Lastly, of contracts relating to the carriage of *passengers*.<sup>e</sup> These are subject to the same rules of construction as charter-parties and other mercantile instruments. In one case the question arose upon an agreement under seal whether the master was bound to touch at an intermediate port.<sup>f</sup> In another, whether there was any promise implied by law to pay an *extra* sum for sleeping in the cabin, when (as it was contended) the passenger was only entitled to swing his cot in the steerage.<sup>g</sup> Frequently, disputes arise about the passage-

Contracts concerning passengers.

<sup>a</sup> *Lamoy v. Werry*, 2 Br. P. C. 60; *Jamieson v. Laurie*, 6 Ib. 472.

<sup>b</sup> *Pordage v. Cole*, 1 Wm. Saund. 320; *Glinho'm v. Hays*, 2 Sc. N. C. 482; *Ritchie v. Atkinson*, 10 East, 295; *Havelock v. Geddes*, Ib. 555; *Davidson v. Gwynne*, 12, Ib. 381.

<sup>c</sup> *Hotham v. E. I. Co.* Dougl. 259;

*Hume v. same*, 1 W. Bl. 291.

<sup>d</sup> *Tod v. E. I. Co.* 20 May, 1788.

<sup>e</sup> *Ante*, pp. 154, 163.

<sup>f</sup> *Corbin v. Leader*, 10 Bing. 275.

<sup>g</sup> *Adderley v. Cookson*, 2 Camp. 15; see also *Leman v. Gordon*, 8 C. & P. 392.



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money,<sup>a</sup> whether the whole or any part of it is to be forfeited, refunded, or the like. The usage of the particular trade in general renders all these questions comparatively easy, if the Passengers' Act does not apply, or the complainant thinks proper to resort to his common law remedies.

## CHAPTER XI.

### OF THE CONTRACT FOR CONVEYANCE OF MERCHANDISE IN A GENERAL SHIP.

Advertise-  
ments.

THE contract for the conveyance of merchandise in a general ship is that, by which the master and owners of a ship, destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination. It has been already shown that this contract, although usually made personally with the master, and not with the owners, is considered in law to be made with them also, and that both they and he are separately bound to the performance of it.<sup>b</sup> When a ship is intended to be thus employed, it is usual in London and other places, to give notice of the intention by printed papers and cards, mentioning the name and destination of the ship; her burthen, and sometimes her force; and sometimes expressing also that the ship is to sail with convoy, or with the first convoy for the voyage, or other matters relating thereto. Such expression<sup>c</sup> is an assurance or warranty to the merchant, who lades goods in pursuance of the advertisement, and becomes a part of the contract with him, although it be not afterwards contained in the bill of lading. If a general ship be advertised for a particular voyage, the owner must give notice of any alteration to persons who afterwards ship goods, otherwise he will have to make good any loss they sustain by still thinking that his destination was the same.<sup>d</sup>

Bill of lad-  
ing.

When goods are sent on board the ship, the master, or person on board acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two, and sometimes three, parts of a bill of lading, of which the merchant commonly sends one or two to his agent, factor, or other person, to whom the goods are to be delivered at the place of desti-

<sup>a</sup> *Yates v. Duff*, 5 C. & P. 569; see also *Mulloy v. Backer*, 5 East, 316.

<sup>b</sup> P. 166, and see *post*, 176.

<sup>c</sup> Said to be so understood among merchants, &c. by the Jury, in the case of *Runquist v. Ditchell*, 3 Esp. 64; *sed*

*qu.* see *Sanderson v. Bushier*, 4 Camp. 54, n.; *Kain v. Old*, 2 B. & C. 627, and cases cited in *Freeman v. Baker*, 5 B. & Ad. 805.

<sup>d</sup> See *Peel v. Price*, 4 Camp. 243.

ation, that is, one on board the ship with the goods, another by CHAP. XI. the post or other conveyance, and one he retains for his own security.<sup>a</sup> The master should also take care to have another part for his own use.

## OLD FORM OF A BILL OF LADING.

I. W. } Shipped, by the grace of God, in good order, by A. B.,  
No. I. a. 20. } merchant, in and upon the good ship called the  
whereof C. D. is master, now riding at anchor in the river of  
Thames, and bound for , 20 bales, containing 100  
pieces of broad cloth, marked and numbered as per margin; and are  
to be delivered in the like good order and condition at  
aforesaid (*the dangers of the seas excepted*), unto E. F. merchant  
there, or to his assigns, he or they paying for the said goods  
per piece freight, with primage and average accustomed. In witness  
whereof, the master or purser of the said ship hath affirmed to three  
bills of lading of this tenor and date, one of which bills being accom-  
plished, the other two to stand void. And so God send the good  
ship to her designed port in safety.

Dated at L., &c.

The terms of this exception were altered many years ago, in con- Exceptions  
sequence of an alarm taken by the shipowners at the decision of in.  
a cause,<sup>b</sup> that will be mentioned in a subsequent chapter; and of  
late the exception is usually made in the following words:—(*The  
act of God, the Queen's enemies, fire, and all and every other  
dangers and accidents of the seas, rivers, and navigation, of whatever  
nature and kind soever excepted.*) But in the case of ships home-  
ward-bound from the West India Islands, which used, it seems, to  
send their boats to fetch the cargo from the shore, there was intro-  
duced a saving out of this exception of risk of boats, "so far as ships  
are liable thereto." And in that case the whole clause was as  
follows:—*The act of God, the Queen's enemies, fire, and all and  
every other dangers and accidents of the seas, rivers, and naviga-  
tion, of whatever nature and kind soever, save risk of boats, so far  
as ships are liable thereto, excepted.* Other exceptions are and may  
be introduced, to take away the responsibility of the masters and  
owners in various cases, for which they would otherwise be respon-  
sible. In the recent case of *De Rothschild v. the R. M. S. Packet  
Co.*,<sup>c</sup> the exception was—the act of God, the Queen's enemies, pirates,  
robbers, fire, accidents from machinery, boilers, and steam, the dangers  
of the seas, roads, and rivers, of what nature or kind soever. A box  
of gold-dust was carried by the defendants across the Isthmus of Pa-  
nama to Chagres, whence it was shipped to Southampton, and there  
placed in a railway truck, whence it was secretly stolen in its transit to  
London:—*Held*, that this was not within the exception a loss by  
robbers or by dangers of the roads, since the word robbers meant not

<sup>a</sup> See *Code de Commerce, du connaisse-  
ment*, liv. 2, tit. 7 (281).

<sup>b</sup> *Smith v. Shepherd*, post, 196.

<sup>c</sup> 7 Exch. 734; and see *Phillips v.  
Nairne*, 4 C. B. 350; *Laveroni v. Drury*,  
8 Exch. 166.

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thieves, but robbers by violence; and dangers of the roads meant dangers of *marine* roads; or if of *land* roads, such dangers as are immediately caused by roads, as overturning of carriages, and the like. When goods are shipped on account of the shipowner, a nominal freight, or *no freight, being owners property*, is usually inserted in the bill of lading.<sup>a</sup> In the above-mentioned form of a bill of lading, the name of a consignee is mentioned, but sometimes the shipper or consignor is himself named as consignee, and the engagement is expressly to deliver to him or his assigns; and sometimes no person is named as consignee, but the terms of the instrument are—to be delivered, &c., unto order, or assigns, which words are generally understood to import an engagement on the part of the master to deliver the goods to the person, to whom the shipper or consignor shall order the delivery, or to the assignee of such person. This subject will be further considered in a subsequent chapter.<sup>b</sup>

Master's  
authority to  
give bill of  
lading.

Between  
what parties  
it is conclu-  
sive.

Leading fea-  
tures of

Transfer of  
it.

In describing the master's authority to bind his employers, I have stated where he can, and where he cannot, bind the shipowners, by signing a bill of lading. I will now endeavour to give, in few words, the legal effect of one, assuming him to have acted within the scope of his authority in giving it, and that they are bound by his act. It is this:—a bill of lading is not *conclusive* between the original parties to it; but in the hands of a *bonâ fide* indorsee for value, it is.<sup>c</sup> Let us suppose the master to have signed a bill of lading acknowledging the receipt of goods not actually on board, or for more than has been actually shipped, what then? The answer is, that the shipowner is not charged by such a bill of lading, whether it be in the shipper's hands, or in the possession of an indorsee for value.<sup>d</sup> The master would probably be liable for the consequences of his deceit.<sup>e</sup> A brief summary of the leading features of a bill of lading may be useful to the merchant, as well as to the lawyer, and therefore I will attempt one. 1. It may be made a negotiable instrument. 2. It is sometimes regarded as a receipt or memorandum operating, between some parties, as an estoppel, between others, as *primâ facie* evidence only of what it contains. 3. It is an authority in its nature revocable. 4. It is, between some parties, evidence of a contract. In other words, there are few instruments, if any, that assume such varied shapes, as bills of lading. Its elasticity seems to know no bounds within the range of substantial justice; partaking, in turn, of some of the properties of a bill of exchange, of a contract, of a bare authority, of a receipt or memorandum, and of an assignment.<sup>f</sup> A transfer of it is made by indorsement and delivery. Whether a transfer of it operates *per se*

<sup>a</sup> Brown v. North, 8 Exch. 1.

<sup>b</sup> *Stopp. in Transitu, post.*

<sup>c</sup> Bates v. Todd, 1 M. & R. 106;  
Howard v. Tucker, 1 B. & Ad. 712;  
Berkley v. Watling, 7 A. & E. 29;  
Grant v. Norway, 10 C. B. 687.

<sup>d</sup> Hubbersty v. Ward, 8 Exch. 330;  
Grant v. Norway, 10 C. B. 686; Bates

v. Todd, 1 Moo. & R. 106.

<sup>e</sup> Lickbarrow v. Mason, 1 Smith's L.  
C. 388; 2 T. R. 75.

<sup>f</sup> As to the nature of a bill of lading  
see further in Bryans v. Nix, 4 M. & W.  
775; Wait v. Baker, 2 Exch. 1; Van  
Casteel v. Booker, 1b. 698; Brown v.  
North, 8 Exch. 1.

as a transfer of the property, was set at rest by the case of *Lickbarrow v. Mason*.<sup>a</sup> It confers it absolutely upon a third person, infeasible by any claim *on the part of the consignor*.<sup>a</sup> The contract, be it observed, is not transferred so as to enable the transferee to sue upon it in his own name; nor to create, it seems, any privity of contract between him and the shipowner.<sup>b</sup> If a bill of lading be clogged with any condition in the body of it, or in the indorsement, as if the goods are to be delivered, *provided A. B. pay a certain draft*, or the like, all subsequent indorsees take it subject to such proviso or condition, and have no title until it be complied with.<sup>c</sup> So, if an indorsee take it under circumstances of fraud or the like, he stands in no better situation than the consignee.<sup>d</sup> Whether it be a negotiable instrument without the word *assigns*, may be very much doubted; a person, however, receiving goods under one, in such a form, would, perhaps, be liable for freight.<sup>e</sup> The transfer here meant, is that of a purchaser, not of a factor; for, notwithstanding the 6 Geo. 4, c. 94, and 5 and 6 Vict., c. 39, the latter has not the same disposing power over such property as if it were his own to all intents and purposes.

CHAP. XI.

Rights of indorsee.

Near akin to some of these, is the question, who is to sue for injury to, for loss, or conversion of goods after shipment? the consignor or consignee? The shipper, with whom the contract is made by the master, may proceed upon it;<sup>f</sup> but apart from the remedy on the contract. The person to be made plaintiff is he who has the property and right of possession in them; who this is depends, in general, upon the legal effect of the shipment or the delivery of the goods. As regards common carriers by land, the rule is that a delivery to any indifferent carrier, on the mere motion of the vendor, is not, in law, a delivery to the vendee: to vest the property, the delivery must be to a carrier, named by the vendee or usually employed by them in carriage or like circumstances.<sup>g</sup> The same rule prevails as regards the delivery of goods to carriers by water. A shipment or delivery of goods on board a purchaser's ship does not *necessarily* vest the property in him; for, notwithstanding the shipment, a consignee's right to the possession may not be perfect; for the intention of the parties may still be, that the property is not to vest in the consignee until bills be accepted, or until the performance of some condition precedent. The vendor should, however, protect himself, by special terms restraining the effect of such delivery.<sup>h</sup> Again, as a precautionary measure, when the parties do really intend that the property should not vest in the consignee until the performance of some condition,

Who to sue for loss, &amp;c. of goods, after shipment.

When property vests in consignee.

<sup>a</sup> 1 Sm. L. Ca. 388; and see *Berkley v. Watling*, 7 A. & E. 35; 1 B. & P. 563; *Cuming v. Brown*, 9 East, 406; *Blackburn on Contr.* 279.

<sup>b</sup> *Howard v. Shepherd*, 9 C. B. 297.

<sup>c</sup> *Barrow v. Coles*, 3 Camp. 92; and see *Mitchel v. Ede*, 11 A. & E. 902.

<sup>d</sup> *Cuming v. Brown*, 9 East, 506.

<sup>e</sup> *Renteria v. Ruding*, M. & M. 511;

*Scaife v. Tobin*, 3 B. & Ad. 523.

<sup>f</sup> *Sargent v. Morris*, 3 B. & A. 277; *Joseph v. Knox*, 3 Camp. 320.

<sup>g</sup> *Coats v. Chaplin*, 3 Q. P. 492.

<sup>h</sup> See *Van Casteel v. Booker*, 2 Exch. 691; *Turner v. The L. Docks*, 6 Exch. 543; *Ellershaw v. Magniac*, 1b. 570, n.; *Brown v. North*, 8 1b. 16; and see *Key v. Cotesworth*, 7 1b. 595.

Abbott on Shipping. one bill of lading *unindorsed* should be sent to him, and another *indorsed* to the shipper's agent; the one to inform the consignee of the shipment, the other to be handed over to him when the condition is performed. The consignee should also be told that a bill of lading, *indorsed*, is in the hands of the shipper's agents.<sup>a</sup> When goods are shipped under a bill of lading, making them *deliverable to the shipper's own order*, the property does not vest in the consignee until the bill of lading has been delivered to and has been accepted by him.<sup>b</sup> Then by framing the bill of lading so, and withholding its delivery to him, security may be obtained. The master must adhere strictly to his engagements with the shipper, as to the delivery. The bill of lading is at once the contract and his instructions. If the consignee be named, and he produce a bill of lading properly indorsed, the master can have no difficulty, and can run no risk. If he is to deliver to the order of the shipper, such order is to be looked for in a bill of lading properly assigned; and to the person producing such an order, the master is to deliver the goods mentioned in it.

Master's duty.

The consignor's right to stop the goods *in transitu* is left for another chapter.

Whether quality and quantity of cargo should be specified in bill of lading.

If there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly. By the French ordinance of Louis XVI., it was required, that bills of lading should contain the quality, quantity, and marks of the merchandise, the name of the merchant who loaded them, and of the person to whom they were to be delivered, the place of departure and destination, the names of the master and the ship, and the price of the freight.<sup>c</sup> It is obvious that the quality, and frequently also the quantity, of the goods must be unknown to the master; and the commentator on the ordinance informs us, that by the quality, the exterior and apparent quality only is meant; and further, that it is usual for the master to insert words, denoting that the quality and quantity are only according to the representation of the merchant; of which practice he approves, and mentions two disputes decided in favour of the master in consequence of this precaution.<sup>d</sup> Some of the more ancient writers on maritime law, mention the case of goods put on board a ship without the knowledge or consent of the master or owners. It is evident that in such a case no contract for conveyance is made, but nevertheless the master, upon delivery of them, will be entitled to the usual freight for the voyage.

Goods put on board without consent of master.

Having thus considered the several particulars belonging distinctly to the two different species of contract for the conveyance of merchandise by sea, I proceed, in the following chapters, to treat of those general circumstances which may belong to both.

<sup>a</sup> Key v. Cotesworth, 7 Exch. 607.

<sup>b</sup> Wait v. Baker, 2 Exch. 1; and see Van Casteel v. Booker, 1b. 699.

<sup>c</sup> Liv. 3, tit. 2. Des Con. art. 2; and see the *Code de Commerce*, liv. 2, tit. 7, tit. *Du Connaissance*.

<sup>d</sup> Valin, *ubi supra*. By the 26 Geo.

3, c. 86, gold, silver, diamonds, &c. must be inserted in the bill of lading, or otherwise declared in writing: if not, the master or owner will not be liable for any robbery, embezzlement, making away with, or secreting thereof. See Gibbs v. Potter, 10 M. & W. 70.

## CHAPTER XII.

## THE GENERAL DUTIES OF THE MASTER AND OWNERS.

Whatever way the contract for the conveyance of merchandise be, the master and owners are thereby bound to the performance of its duties of a general nature. I propose to treat of these duties in the present chapter, and shall consider them as they regard, 1st, reparation for the voyage; 2nd, the commencement; 3rd, the completion; and, lastly, the completion, of the voyage.

1st, firstly, as to the preparation for the voyage. The first duty is to provide a vessel tight and staunch, and furnished with all the apparel necessary for the intended voyage.<sup>a</sup> For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be known to the master or owners: but in the body there may exist defects unknown to both. The French Ordinance (of 1681)<sup>b</sup> says, that if the merchant can prove, that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall forfeit his freight, and pay the merchant his damages and interest. Pothier, in his commentary on this article, cites an observation of Boullenois, "that the punishment of the master in this case ought not to be thought too severe, because the master by the nature of the contract of affreightment is necessarily held to warrant, that the ship is tight, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest." Pothier himself adds that this is so, although before the departure the ship may have been visited according to the practice in France, and reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, which by consequence," says he, "the owner or master remains responsible: and this the more justly, because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he is still answerable, being necessarily bound to furnish a ship good and capable of the voyage." Pothier, taking notice of this article,<sup>c</sup> in the commentary upon it, declares his own opinion (in conformity, as he observes, to the general principles of law established

<sup>a</sup> Merigon, tom. 1, p. 373; Roccus, 19, 57, 69; Ord. of Rotterdam, 2, s. 101, art. 124; Molloy, b. 2, s. 10; Wellwood's Sea Laws, tit. 2.

<sup>b</sup> *iv.* 3, tit. 3, *Fret*. art. 12.

<sup>c</sup> *traité de Charte-partie*, n. 30. The author here refers to his own excellent *de Louage*, part 2, ch. 1, sect. 4.

But it rather appears to me that the cases there laid down by himself,

warrant the conclusion that in this instance the owner and master ought to be responsible for the loss. "Lorsque le locateur devoit par sa profession être informé du vice de la chose louée, il est tenu de dommage et intérêts du conducteur, sans qu'il soit besoin de chercher si effectivement il en a eu connoissance ou non:" and he instances the cases of a cooper or shopkeeper letting casks made of bad wood.

Abbott on Shipping.

Must be properly manned.

Pilot.

Loading.

Responsibility of master for goods.

in his own treatise on the contract of letting to hire) to be, that if the ship has been visited and reported sufficient, the master or owner shall not be answerable for damages occasioned by a defect, which they did not, nor could know; but he agrees that they shall lose their freight. It may be observed, however, that defects of this sort cannot exist, unless occasioned by the age, or particular employment of the ship, or some accidental disaster that may have happened to it; all of which ought to be known to the owner, and ought to lead to an examination of the interior as well as exterior parts. And indeed, *this contract, although greatly partaking of the nature of the contract of letting to hire, is not precisely the same, but includes in itself a warranty, beyond that which is contained in the contract for letting to hire.* In a charter-party, the person who lets the ship covenants that it is tight, staunch, and sufficient; if it is not so, the terms of the covenant are not complied with, and the ignorance of a covenantor can never excuse him. And with regard to a general ship, Ch. J. Holt, in his elaborate argument on the law of bailments,<sup>a</sup> distinguishes the contract made for the carriage of goods from the contract of letting to hire; and speaking of the former, when made by a person in a public employment, says, "The law charges the person (viz. common carrier, hoyman, master of a ship) thus entrusted to carry goods, against all events but acts of God and of the king's enemies;" so that a common carrier is an insurer against all perils or losses not within the exception. And the contract of *insurance*, properly so called, is clearly void, if the ship, at the commencement of the risk, be not sea-worthy, although the person who has effected the insurance be ignorant of that circumstance.<sup>b</sup> And not only must the ship, and her furniture, be sufficient for the voyage, but she must also be furnished with a sufficient number of persons of competent skill and ability to navigate her. And, for sailing down rivers, out of harbours, or through roads, &c., where, either by usage, or the laws of the country, a pilot is required, a pilot must be taken on board.<sup>c</sup>

The manner of taking goods on board, and the commencement of the master's duty in this respect (not to mention at present the observation of the regulations of the Custom-house)<sup>d</sup> depend on the custom of the particular place.<sup>e</sup> More or less is to be done by wharfingers or lightermen according to the usage. If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt.<sup>f</sup> And as soon as any goods are put on board, he must provide a sufficient number of persons to protect them;<sup>g</sup> for, even if the crew be overpowered by

<sup>a</sup> *Coggs v. Bernard*, 2 Ld. Raym. 918; 1 Smith's L. C. 82.

<sup>b</sup> *Ante*, p. 62.

<sup>c</sup> *Ante*, pp. 139, 148.

<sup>d</sup> *Post*, p. 182.

<sup>e</sup> See *Cobban v. Downe*, 5 Esp. 41.

<sup>f</sup> *Molloy*, b. 2, ch. 2, s. 2; *Roccus*, Not. 88; *Wellwood*, tit. 9, Dig. 4, 9, 3; see *Morewood v. Pollok*, 1 E. & B. 743.

<sup>g</sup> *Morse v. Slue*, 1 Vent. 190, 238; *Rich v. Kneeland*, Hob. 17; Dig. 4, 9, 1, 1. "Nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt, coeundi, cum ne nunc quidem abstineant hujusmodi fraudibus." But the word *fures* here means *thieves* only and not *robbers*, who come with a superior and irresistible force; they are called *latrones*: thus by the Digest, 17, 2, 52,

superior force, and the goods stolen, while the ship is in a port CHAP. XII.  
 ever within the body of a county, the master and owners will be  
 erable for the loss, although they have been guilty of neither  
 nor fault: the law, in this instance, holding them responsible  
 reasons of public policy, and to prevent the combinations, that  
 otherwise be made with thieves and robbers.<sup>a</sup> It is in all Care in  
 the duty of the master to provide ropes, &c., proper for the shipping,  
 reception of the goods into the ship.<sup>b</sup> And if a cask be stowing, &c.  
 entally staved in letting it down into the hold of the ship, the  
 or must answer for the loss.<sup>c</sup> The ship must also be furnished  
 proper dunnage (pieces of wood placed against the sides and  
 m of the hold) to preserve the cargo from the effects of leakage  
 ding to its nature and quality.<sup>d</sup> And care must be taken by  
 aster (unless by usage or agreement this business is to be  
 rmed by persons hired by the merchant) so to stow and arrange  
 ifferent articles, of which the cargo consists, that they may not  
 ured by each other, or by the motion or leakage of the ship.<sup>e</sup>  
 more must not be taken on board than the ship can conveniently Quantity of  
 , leaving room for her own furniture and the provisions of the goods.  
 and for the proper working of the vessel.<sup>f</sup> Neither may the Contraband  
 or take on board any contraband goods, whereby the ship and goods.  
 parts of the cargo may be liable to forfeiture or detention.<sup>g</sup>  
 aster must also take on board no false or colourable papers, Proper pa-  
 may subject the ship to capture or detention;<sup>h</sup> and he must pers, &c.  
 re and keep on board all the papers and documents required must be on  
 ie manifestation and protection of the ship and cargo by the board.

partner, who has the care of the  
 property, is not answerable, "si id  
 tio aut incendio perierit," but he  
 verable, "si a furibus subreptum  
 Upon which Gothofred observes,  
 casus latrones parum prodest cus-  
 —adversus fures prodesse potest,  
 s advigilet. Latrocinium fatale  
 m, sed casus fortuitus est; at non  
 ." And the words of the Digest,  
 lautæ caupones stabularii, &c. 4,  
 are, "nisi si quid damno fatali  
 gat; inde Labeo scribit, si quid  
 gio, aut per vim piratarum perierit,  
 use iniquum exceptionem ei dari,  
 rit dicendum si in stabulo aut in  
 a vis major contigerit." So that  
 at present is stricter in the case  
 tiera, than the Civil law; but it is  
 o have been the same formerly,  
 t to have charged a carrier in the  
 f robbery, unless he travelled by  
 ous ways, or at unreasonable hours.  
 mes on Bailments, p. 103; *post*,

<sup>d</sup> Ord. of Rotterdam, 2 Magens, 101,  
 art. 125, 126.

<sup>e</sup> Wellwood, p. 29; Ord. of Antwerp,  
 2 Mag. p. 16, art. 8; French Ord. liv. 2,  
 tit. Du Cap. art. 12; Laws of Wisbuy,  
 art. 23; Laws of Oleron, art. 11, and  
 Cleirac thereon.

<sup>f</sup> Roccus, Not. 30, Ord. of Rot. 2  
 Mag. p. 102, art. 127, as to *deck cargo*,  
 see p. 10.

<sup>g</sup> Molloy, b. 2, ch. 2, s. 7; Roccus,  
 Not. 66; Wellwood, tit. 9. See the  
*Customs Consolidation Act*, 1853, 16 &  
 17 Vict. c. 107.

<sup>h</sup> Guidon, ch. 5, art. 33; Molloy, b.  
 2, ch. 2, s. 9; see *Horneyer v. Luashing-*  
*ton*, 15 East, 47; *Oswell v. Vigne*, Ib.  
 70. The papers usually on board are,  
 the ship's register; a manifest prepared  
 by the broker of the goods shipped; a  
 victualling bill; a bill of content (for the  
 Customs); receipts from the Trinity-house  
 that the pilotage, lights, and local dues  
 have been paid. Note, Treasury Minute  
 of 30th December, 1853, dispenses with  
 s. 142 of the Customs Act as to requir-  
 ing the 14 days list and the extra bill of  
 lading; and see *Code de Commerce*, art.  
 226.

<sup>e</sup> *De Rothschild v. R. M. S. P.*  
*Exch.* 734.

<sup>f</sup> Laws of Oleron, art. 10; Laws of  
 y, art. 22; Wellwood, tit. 9.

<sup>g</sup> *v. Clinkard*, cited 1 Wils. 282.



*Abbott on  
Shipping.*

When to  
sail.

In what  
ships ware-  
housed  
goods to be  
exported.

Certificate  
of clearance  
and entry  
outwards.

Goods only  
to be ship-  
ped on pro-  
per days  
and places,  
and not un-  
til entry and  
clearance.

law of the countries, from and to which the ship is bound; and by the law of nations in general, and treaties between particular states.<sup>a</sup> The rule of the French Ordinance (of 1681),<sup>b</sup> on this subject is, that the master must have on board the charter-party and other documents relating to the proof of his lading. Valin, in his commentary on the Ordinance, says, that this article relates chiefly to a time of war, and that if a ship should be condemned as good prize on account of the master's failure in this respect, he must answer for the event. I have confined the rule in the manner above expressed, because it would be unjust to charge the master or owners for some cases of omission, upon which ships have been condemned in France, although the terms of the condemnation have been such as to discharge the insurers from their responsibility, according to the established rule of the law of nations, which holds the sentence of a foreign court to be conclusive of the fact, upon which it is founded, *when such fact appears on the face of the sentence free from doubt*, and to which rule the courts of justice in this country have adhered with the dignity belonging to regular and permanent establishments.<sup>c</sup> Where by the terms of a charter-party a number of days is appointed for the lading of the cargo, either generally and without payment on that particular account by the merchant, or by way of demurrage, the master must not sail before the expiration of the time. On the other hand, a delay in sailing, to be justified, can only be for the purposes of the voyage, as for papers, provisions, or the like.<sup>d</sup>

As to the *exportation and entry of goods*, and the clearance of ships from the U. K. to parts beyond the seas, the Customs Consolidation Act, 1853 (16 & 17 Vict., c. 107), contains the most important matter. It declares that "no person shall export any warehoused goods; nor enter any such goods for exportation from the U. K. to parts beyond the seas in any ship of less burden than 50 tons, except to the islands of Guernsey and Jersey, in ships not being of less than 40 tons burden, regularly trading to those islands."<sup>e</sup> That the master shall, before any goods be taken on board, deliver to the collector or comptroller a certificate from the proper officer of the due clearance inwards or coastwise of such ship of her last voyage, and shall also deliver therewith an entry outwards of such ship. And if such ship shall have commenced her lading at some other port, the master shall deliver to the searcher the clearance of such goods from such other port; and if any goods be taken on board any ship at any port before she shall have been entered outwards at such port (unless a stiffening order, when necessary, shall be issued by the proper officer to lade any heavy goods for exportation on board such ship), the master shall forfeit the sum of 100*l*.<sup>f</sup>

That "no goods shall be shipped, put off, or water-borne to be shipped for exportation, from any port or place in the U. K., except on days not being Sundays or holidays, nor from any place except

<sup>a</sup> See 16 & 17 Vict. c. 107.

<sup>b</sup> Liv. 3, tit. 1, cha-parties, art. 10, and Valin thereon. See also Poth. ch-partie, n. 31.

<sup>c</sup> See 2 Smith's L. C. 453.

<sup>d</sup> Langhorn v. Allnutt, 4 Taunt. 511; Raine v. Bell, 9 East, 195; Palmer v. Marshall, 8 Bing. 320; *post*, 190.

<sup>e</sup> s. 117.

<sup>f</sup> s. 118.

some legal quay, wharf, or other place duly appointed for such purpose, nor without the presence or authority of the proper officer of Customs, nor before due entry outwards of such ship, and due entry of such goods, nor before such goods shall have been duly cleared for shipment; and it shall be lawful for the searcher to open all packages and fully to examine all goods shipped or brought for shipment at any place in the U. K."<sup>a</sup> The exporter must also deliver a shipping bill; but, for the present, we omit this part of the Act.<sup>b</sup>

CHAP. XII.

Opening packages by searcher.

Shipping bill.

Shipping of stores.

*As to the victualling bill for stores:* The master of every ship of 50 tons or upwards, departing from any port in the U. K. upon a voyage to parts beyond the seas, the duration of which out and home shall not be less than 40 days, shall, upon due application made by him, and upon such terms and conditions as the Commissioners of Customs may direct, receive from the searcher an order for the shipment of such stores as may be required; and after such stores are shipped, the master or his agent shall make out an account of the stores so shipped, together with any other stores then already on board, and the same, when presented to the searcher, signed by him, and countersigned by the collector or comptroller, shall be the victualling bill; and no stores shall be shipped for the use of any ship nor any articles taken on board any ship be deemed to be stores, except such as shall be borne upon such victualling bill.<sup>c</sup> *As to the clearance of ships outwards:* If there be on board any ship, any goods, being part of the inward cargo reported for exportation in the same ship, the master shall, before clearance outwards of such ship from any port in the U. K., deliver to the searcher a copy of the report inwards of such goods, certified by the collector or comptroller; and if such copy be found to correspond with the goods so remaining on board, the searcher shall sign the same, to be filed with the certificates or cockets, if any, and victualling bill of the ship. Before any ship shall be cleared outwards from the U. K., with any goods shipped or intended to be shipped on board the same, the master shall deliver a content of such ship to the searcher, and shall make and subscribe the declaration at the foot thereof, in the presence of the collector or comptroller, and shall answer such questions as shall be demanded of him concerning the ship, the cargo, and the intended voyage, by such collector or comptroller. And before clearance the certificates, if any, shall be delivered to the searcher, who shall compare the shipping bills with the content and certificates, if any, and file such certificates; copy of report inwards, if any, of goods reported for exportation in such ship, and the victualling bill, with a label attached and sealed thereto; and such label, when filled up and signed by the searcher and the collector or comptroller, shall, as to the goods comprised therein, be the clearance and authority for the departure of the ship; and the shipper of any British goods and such goods as were previously chargeable with duty at value laden in such ship shall, under a penalty of 20*l.*, deliver to the broker, agent, or other person clearing such ship, a duplicate of the bill of lading thereof at the time of signing thereof, with an endorsement thereon of the quantity and value of such goods, and such broker, agent, or other person as afore-

Clearance of ships outwards.<sup>d</sup><sup>a</sup> s. 119.<sup>c</sup> s. 140.<sup>b</sup> s. 120.<sup>d</sup> ss. 141-144.

|                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Albott on Shipping.</i>                               | said, shall, within 14 days after such final clearance of the ship, sign and deliver to the Collector or Comptroller of Customs a full and accurate list of all such goods, with the quantities and value thereof, from the bills of lading so delivered to him, with such bill or bills of lading annexed thereto; and on failure thereof such broker, agent, or other person as aforesaid, shall forfeit the sum of 20 <i>l.</i> , and for this purpose the duplicate bill of lading so required shall not be liable to any stamp duty. <sup>a</sup> The goods on board must correspond with content. If any goods be shipped, put off, or water-borne to be shipped, without being duly cleared, or otherwise contrary to the provisions of the Act, the same shall be liable to forfeiture. Before any ship depart                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| In ballast.                                              | <i>in ballast</i> from the U. K. for parts beyond the seas, not having any goods on board except stores from the warehouse borne upon the victualling bill of such ship, nor any goods reported inwards for exportation in such ship, the collector or comptroller shall clear such ship in ballast by notifying such clearance and the date thereof on the victualling bill, and deliver the same to the master of such ship as the clearance thereof; and the master of such ship shall answer to the collector or comptroller such questions touching her departure and destination as shall be demanded of him; and ships having only passengers with their baggage on board, and ships laden only with chalk or slate shall be deemed to be in ballast; and if any such ship, whether laden or in ballast, shall depart without being so cleared, if she have any such stores on board, the master shall forfeit                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Boarding of ships after clearance outwards. <sup>c</sup> | and pay the sum of 100 <i>l.</i> <sup>b</sup> <i>As to the boarding of ships after clearance outwards</i> , it provides that any officers of Customs may go on board any ship after clearance outwards within the limits of any port in the U. K., or within four leagues of the coast thereof, and may demand the ship's clearance; and if there be any goods on board in respect of which certificates are required, not contained in such certificates, or any stores not endorsed on the victualling bill, such goods or stores shall be forfeited; and if any goods contained in such certificates be not on board, the master shall forfeit the sum of 20 <i>l.</i> for every package or parcel of goods contained in such certificates and not on board. If officers put seals upon stores from the warehouse outwards, and such seals be broken, the master is to forfeit 20 <i>l.</i> That if any ship departing from any port in the U. K. shall not bring to at such stations as shall be appointed by the Commrs. of Customs for the landing of officers from such ships, or for further examination previous to such departure, the master of such ship shall forfeit the sum of 20 <i>l.</i> The time at which any goods shall be shipped on board any export ship shall be deemed to be the time of exportation of such goods, and <i>the time of the last clearance of any ship shall be deemed to be the time of departure of such ship.</i> <sup>d</sup> |
| Time of exportation and departure defined.               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Coasting trade of United Kingdom. <sup>e</sup>           | <i>As to the coasting trade of the U. K.</i> , it declares that all trade by sea from one part of the U. K. to any other part thereof shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships within the meaning of the Customs Acts. That no goods or passengers shall be carried coastwise from one part of the U. K. to another, except in British ships, and that coasting vessels are to be confined to coasting voyage. That if                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

<sup>a</sup> See *ante*, p. 181, n. (h.)<sup>c</sup> ss. 146—148.<sup>b</sup> s. 145.<sup>d</sup> s. 149.<sup>e</sup> ss. 151—158.

any goods shall be unshipped from any ship arriving coastwise, or be shipped or water-borne to be shipped to be carried coastwise on Sundays or holidays, or unless in the presence or with the authority of the proper officer of the Customs, or unless at such times and places as shall be appointed or approved by him for that purpose, the same shall be forfeited, and the master of the ship shall forfeit the sum of 50*l*. That the master of every coasting ship must keep a cargo-book, stating the name of the ship, &c., and if, upon examination, any package entered in the cargo-book as containing foreign goods shall be found not to contain such goods, such package, with its contents, shall be forfeited; or if any package shall be found to contain foreign goods not entered in such book, such goods shall be forfeited; and if such master shall fail correctly to keep such cargo-book, or to produce the same, or if at any time there be found on board such ship any goods not entered in such book as laden, or any goods noted as delivered, or if any goods entered as laden or any goods not noted as delivered be not on board, the master of such ship shall forfeit the sum of 20*l*. And an account previous to departure must be delivered to the Collector, but the Comms. may grant general transires, which are to be delivered in 24 hours after arrival. Any Custom-house officer may go on board and examine any coasting ship.

CHAP. XII.

Times and places for landing and shipping.

Master of coasting vessel to keep a cargo-book.

Penalty for false entries in such book.

As to particular provisions relating to the Channel Islands and British possessions abroad;<sup>a</sup> sugar and rum may be imported into the British Possessions in the West Indies and South America and the Mauritius in certain cases. Foreign reprints of books under copyright are prohibited.

As to the coasting trade of the British possessions: No goods or passengers shall be carried from one part of any British possession in Asia, Africa, or America, to another part of the same possession, except in British ships.<sup>b</sup> And the master of every ship arriving in any of the British possessions in America, or the Channel Islands, whether laden or in ballast, shall come directly, and before bulk be broken, to the Custom-house for the port or district where he arrives, and there make a report in writing to the proper officer of Customs in the same form and manner as herein-before provided on the arrival of any ship in the U. K., so far as the same may be applicable; and if any goods be unladen from any ship before such report be made, or if the master fail to make such report, or make an untrue report, or do not truly answer the questions demanded of him, he shall forfeit the sum of 50*l*.; and if any goods be not reported, such goods shall be forfeited.<sup>c</sup> The master of every ship bound from any British possessions abroad, except the territories subject to the Government of the presidencies of Bengal, Madras, and Bombay, shall deliver to the proper officer of Customs an entry outwards under his hand of such ship and also subscribe and deliver to such officer a content of the cargo of such ship, if any, or state that she is in ballast, as the case may be, and answer such questions concerning the ship, cargo, if any, and voyage, as shall be demanded of him, in the same manner, as nearly as may be, as is prescribed to be observed on the entry and departure

Coasting trade of.

Ship and cargo to be reported on arrival.

Entry outwards of ship or cargo.

<sup>a</sup> ss. 159—162.<sup>c</sup> s. 164.<sup>b</sup> s. 163.

- Abbott on Shipping.* of any ship from the U. K., and thereupon the proper officer shall give to the master a certificate of the clearance of such ship for her intended voyage; and if the ship shall depart without such clearance, or if the master shall deliver a false content, or shall not truly answer the questions demanded of him, he shall forfeit the sum of 50*l*.<sup>a</sup>
- Entry of goods inwards and outwards. Any person entering goods shall deliver to the proper officer a bill of entry thereof, containing the name of the ship and of the master, and of the place to or from which bound, and the particulars of the quality and quantity of the goods, and the packages containing the same, stating whether such goods be the produce of the British possessions in America or not, and the proper officer shall thereupon grant his warrant for the lading or unlading of such goods.<sup>b</sup> No goods shall be laden or water-borne to be laden on board any ship, or unladen from any ship in any of the British possessions in America or in the Channel Islands, until due entry shall have been made of such goods, and warrant granted for the lading or unlading of the same.<sup>c</sup>
- Entry of goods to be laden or unladen. No goods or passengers shall be brought, imported, or carried into the U. K. from the *Channel Islands*, nor shall any passengers or goods be exported or carried from the U. K. to the said islands, nor shall any goods or passengers be carried from any one of the said islands to any other of them, nor from one part of any of the said islands to another part of the same, except in British ships; and if any goods or passengers be brought, imported, exported, or carried coastwise contrary hereto, all such goods shall be forfeited, and the master of the ship in which the same are so brought, imported, exported, or carried, shall forfeit the sum of 100*l*. No spirits (except rum of the British plantations) shall be imported into or exported from the Channel Islands, or any of them, or be removed from any one to any other of the said islands, or be carried coastwise from any one part to any other part of any one of the said islands, or shall be shipped in order to be so removed or carried in any ship of less burden than 50 tons, nor in any cask or other vessel capable of containing liquids not being of the size or content of 20 gals. at the least; and all spirits imported, exported, removed, carried, shipped, or waterborne to be so shipped, removed, or carried, contrary hereto, shall be forfeited, together with the ship and any boat importing, exporting, removing, or carrying the same. Provided always, that nothing herein contained shall extend to any spirits imported in glass bottles as part of the cargo, nor to any spirits being really intended for the consumption of the seamen and passengers during their voyage, and not being more in quantity than is necessary for that purpose, nor to any warehoused goods exported from the U. K. in ships of not less than 40 tons burden, being regular traders to those islands, nor to any boat of less burden than ten tons, for having on board at any one time any foreign spirits of the quantity of 10 gals. or under, such boat having a licence from the proper officer of customs at either of the islands of Guernsey or Jersey for the purpose of being employed in carrying commodities for the supply of the island of Sark, which licence such officer of Customs is hereby
- Trade with the Channel Islands.*<sup>d</sup>
- Licensed boats of ten tons supplying Sark.

<sup>a</sup> s. 165.<sup>b</sup> s. 166.<sup>c</sup> s. 167.<sup>d</sup> ss. 191—193.

required to grant without fee or reward; but if any such boat shall have on board at any one time any greater quantity of spirits than 10 gals. unless in casks or packages of the size and content of 20 gals. at the least, such spirits and boat shall be forfeited. No tobacco, cigars, or snuff shall be imported into the Channel Islands in ships of less than 120 tons burden, nor unless in hogsheads, chests, or cases, each containing not less than 200 lbs. net weight of such tobacco or snuff, nor unless in packages each containing not less than 100 pounds net weight of such cigars, such tobacco or snuff not being in any manner separated or divided within such package, except tobacco, cigars, or snuff from the U. K., which may be imported from thence into the said islands in ships of not less than 50 tons burden, or in ships regularly trading to those islands not being of less than 40 tons burden, and in packages of the same weight and subject to the same provisions in and under which the like sort of goods may respectively be legally imported into the U. K.; and all cigars, tobacco, or snuff imported into the said islands contrary hereto, or which shall be found or discovered to have been on board any ship or boat within one league of the coasts thereof, shall be forfeited, together with the ship or boat.

The island of Malta and its dependencies shall be deemed to be in Europe.<sup>a</sup>

*As to the restrictions on small craft, and the regulations for the prevention of smuggling:* the general enactments are, That every ship or boat which shall be used or employed in any manner contrary to the regulations prescribed by the Comrs. of Customs shall be liable to forfeiture, unless the same shall have been specially licensed by them. That if any such vessel or boat shall be used in the importation, landing, removal, carriage, or conveyance of any uncustomed or prohibited goods, the same shall be forfeited, and the owner and master of every such vessel or boat shall each forfeit and pay a penalty equal to the value of such vessel or boat, not in any case exceeding 500*l*. That no ship or boat belonging wholly or in part to Her Majesty's subjects shall sail from the Channel Islands without a clearance, whether in ballast or having a cargo; and if with cargo, the master shall give bond to H. M. in double the value of such cargo for the due landing thereof, at the port for which such ship or boat clears; and every such ship or boat not having such clearance, or which, having a clearance for her cargo, shall be found light, or to have discharged any part of her cargo before arrival at the port or place of discharge specified in the clearance, shall be forfeited.<sup>c</sup>

2ndly, As to the commencement of the voyage. All things being thus prepared for the commencement of the voyage, the master must commence his voyage without delay, as soon as the weather is favourable.<sup>d</sup> But he must, on no account, sail out during tempestuous weather.<sup>e</sup> By most of the ancient marine ordinances the master is

<sup>a</sup> s. 194.

<sup>b</sup> ss. 199—204.

<sup>c</sup> s. 205.

<sup>d</sup> *Ante*, p. 169. Ordin. of Rotterdam, 2 Magens, p. 102, art. 128. The Ord.

of the Hanse-towns allows two or three days. M<sup>r</sup> Andrew v. Adams, 1 Bing. N. C. 38.

<sup>e</sup> Molloy, b. 2, ch. 2, s. 4; Roccus, Not. 56.

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When there  
is a war-  
ranty to sail  
with con-  
voy.

required, before he hoists sail, to consult his mate, pilot, and others of the crew, as to the wind and weather,<sup>a</sup> but such consultation is not required by the law of England, according to which the entire management of the ship is entrusted to the master. If there has been an undertaking or warranty to sail with convoy, the vessel must repair to the place of rendezvous for that purpose, and the master must put himself under the protection and control of the ships of war appointed under the authority of the Government for the guard of merchant vessels bound to the place of his destination, and keep with them, unless prevented by unavoidable necessity, during the voyage. A warranty that the vessel shall sail with convoy is very common during war in a policy of insurance, and in that case, if it be not complied with, the insurance becomes absolutely void, and the insurers are not answerable for a loss happening by tempest, or other accident wholly independent of the subject of the warranty, for which they would otherwise be liable. But if the warranty be made by the master or owner to the merchant, and not complied with, the master or owner may be responsible for a loss happening by tempest or other accident, for which otherwise the master or owner would not be liable. The merchant having trusted to this warranty of the master or owner, and in confidence of its performance made a similar warranty in his contract with the insurers, and having lost the benefit of his insurance by the breach of the warranty on the part of the master and owners, has a right to receive from them the indemnity, which he has lost by their misconduct.<sup>b</sup> The convoy must be a ship or ships of war appointed under the authority of the Government, that is, immediately by the Government, or by the Commander-in-chief on a particular station. The protection of a ship of war accidentally bound on the same voyage, although discharging the office of a convoy, is not a convoy within the meaning of this warranty.<sup>c</sup> But this warranty to sail or depart with convoy, does not mean that the vessel shall depart with convoy immediately from the landing port, but only from the place of rendezvous appointed for vessels bound from that port.<sup>d</sup> From many ports, and among others from the port of London, no convoy ever sails. It has therefore been held sufficient for a vessel bound from London to sail with convoy from the Downs;<sup>e</sup> and even from Spithead, when there was no convoy appointed at the Downs.<sup>f</sup> Neither does it require the vessel to sail with convoy bound to the precise place of her destination. But if the vessel sail with the only convoy appointed for vessels going to the place of her destination, it is sufficient.<sup>g</sup>

But this warranty does require not only that the vessel shall com-

<sup>a</sup> Wellwood, tit. 8, p. 26; Ord. of Antwerp, 2 Magens, p. 17, art. 11; Emerigon, tom. 1, p. 376. This author also observes that, although the master is bound on this and other occasions to ask the advice of his crew, yet he is not bound to submit blindly to it, if it is bad, or if under the circumstances it

appears to be bad.

<sup>b</sup> See *ante*, p. 94.

<sup>c</sup> Hibbert v. Pigou, *ante*, p. 95.

<sup>d</sup> Warwick v. Scott, 4 Camp. 62.

<sup>e</sup> Lethulier's case, 2 Salk. 443.

<sup>f</sup> Gordon v. Morley, 2 Stra. 1265.

<sup>g</sup> D'Eguino v. Bewicke, 2 H. Bl. 551.

ence the voyage under the protection of the convoy, but also that CHAP. XII.  
 e shall continue during its course under the same protection,<sup>a</sup>  
 less prevented from so doing by tempest or other unavoidable  
 xident, in which cases the master and owners will be excused,<sup>b</sup> if  
 e master does all that is in his power to keep the benefit of the  
 onvoy. Neither is it sufficient for the master to sail in company  
 with the ships of war appointed as the convoy, but he must before  
 he departure obtain, or at least use all due diligence to obtain, the  
 sailing instructions and orders delivered out by the commander of  
 he convoy to the masters of the trading vessels that are to sail  
 under his protection. The necessity of obtaining such orders, if  
 possible, is fully established by the two cases of *Webb v. Thomson*,<sup>c</sup>  
 and *Anderson v. Pitcher*,<sup>d</sup> in the Court of C. P.; in the last of which  
 Ld. Eldon observes, "It being once decided that a convoy within  
 the terms of the policy means a convoy appointed by government,  
 it seems to follow of necessity that the ship must depart with sailing  
 instructions, if by the due diligence of the master they can be ob-  
 tained. The value of a convoy appointed by government in a great  
 measure arises from its taking the ships under control as well as under  
 protection. But that control does not commence until sailing in-  
 structions have been obtained; nor can it be enforced otherwise than  
 by their means. Indeed, the reason of that rule which requires  
 that the convoy should be appointed by Government, shows the  
 necessity of having sailing instructions; since, without them, the  
 ship does not stand in that relation, or under those circumstances, in  
 which she can take the full benefit of the government convoy. If  
 the fleet be dispersed by a storm, how is she to learn the place of  
 rendezvous? If it be attacked by the enemy, how is she to obey  
 signals? In short, what communication can the protected have with  
 the protecting force. It has been contended, that if she be under  
 the protection of the guns, it is sufficient. But will it be contended  
 that, provided she be under the protection of the guns at her depar-  
 ture, though sailing instructions be never obtained during the voyage,  
 or not till the last day of the voyage, the warranty is complied with?  
 Either sailing instructions are not necessary, or, if they be necessary,  
 they must be so at some given period, and can only be dispensed  
 with in some particular cases. Then can any other period be as-  
 signed but the beginning of the voyage?" Each of these two cases  
 arose from the loss of the same vessel, the *Golden Grove*, which had  
 been insured at and from London to the West Indies, with leave  
 to go to the place of rendezvous to join convoy, and warranted to  
 sail from thence with convoy for the voyage; and in the last of  
 them, in which the facts are most fully stated, it appeared that the  
 ship arrived at Spithead about nine o'clock in the morning of the  
 15th Nov., 1795; that she came round under the care of the first  
 mate, the captain himself being on shore at Portsmouth; that on the  
 preceding day (the 14th) sailing instructions were delivered at Ports-  
 mouth to all such ships, as applied regularly for them; and that the

<sup>a</sup> *Lilly v. Ewer*, Doug. 72.

<sup>c</sup> *Webb v. Thomson*, 1 B. & P. 5.

<sup>b</sup> *Jefferies v. Legendre*, Carth. 216;  
<sup>3</sup> Lev. 820.

<sup>d</sup> *Anderson v. Pitcher*, 2 B. & P.  
 164.



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captain of the Golden Grove, previous to her arrival, made inquiry concerning sailing instructions, but found that they could not be obtained until the ship was actually in sight; that on the 15th of Nov., by daylight, Admiral Sir C. H. Christian, the commander of the convoy, got under weigh, but had not entirely quitted the roadstead until about four o'clock in the evening: and when he got under sail, he left the Trident frigate to bring up such vessels as did not weigh anchor with him; that about one o'clock of the same day the captain of the Golden Grove repaired on board, and got under weigh, at which time the Trident had also got under weigh, and both the admiral's ship and the Trident had then proceeded so far, that it was clear the Golden Grove could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter. That on the next day, between ten and twelve o'clock in the forenoon, the captain of the Golden Grove, being only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions; that soon afterwards the Golden Grove was lost, having been from the time of her departure to that of the loss under the protection of the convoy. Upon this state of facts, it was held, that the warranty was not complied with; for either the ship had not arrived time enough to obtain sailing instructions, or, if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before she sailed. On the other hand, if the master do all in his power to obtain sailing instructions, but is prevented from obtaining them by the badness of the weather,<sup>a</sup> or if they are refused by the commander of the convoy;<sup>b</sup> the warranty is complied with.<sup>c</sup> During war, the legislature sometimes enjoins upon merchant vessels the necessity of going with convoy.<sup>d</sup>

Thirdly, As to the course of the voyage.

Voyage to  
be pursued  
without  
delay, &c.

Having commenced his voyage, the master must proceed to the place of destination without delay, and without stopping at any intermediate port, or deviating from the straight and shortest course,<sup>e</sup> unless such stopping or deviation be necessary to repair the ship from the effects of accident or tempest, or to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked, if he proceeds in the ordinary track, and whom he has

<sup>a</sup> *Victorin v. Cleeve*, 2 Stra. 1250. The cause was tried before Ch. J. Lee at Guildhall. See *Sanderson v. Bushier*, 4 Camp. 54.

<sup>b</sup> *Verdon v. Wilmot*, by Ch. Just. Lee at Guildhall, Park Ins. 500, 7th edit.

<sup>c</sup> A very full account of the regulations made at different times in France, on the subject of convoy, is given in Valin's Commentary on the French Ord. tom. 1, p. 691, by which it appears that at particular periods merchant ships have been absolutely forbidden to sail without convoy, under very severe penalties on the master and owners: and that, when-

ever convoy was required, the master was to bring his ship to the rendezvous, and receive sailing instructions (*ordres pour la route*) from the Commandant, and obey his orders, and not separate from him. The Ordinance of Hamburg, of the year 1731, tit. 4, art. 4, requires the master to receive a letter of instructions from the commander of the convoy, 2 Magens, 214.

<sup>d</sup> See 43 Geo. 3, c. 57; *Ingham v. Agnew*, 15 East, 517; *Darby v. Newton*, 6 Taunt. 544.

<sup>e</sup> *Roccus de Assec. Not.* 52. French Ord. liv. 3, tit. 3, Du Fret. art. 10, ante, p. 84.

ood reason to hope that he may escape by delay or deviation; or CHAP. XII.  
 unless the ship sails to the places resorted to in long voyages for a  
 supply of water or provisions by common and established usage.  
 And if the ship has the misfortune to meet with enemies or pirates, Master's  
 the master must perform the part of a valiant man, and make the duty on  
 best resistance which the comparative strength of his ship and crew meeting  
 will allow.<sup>a</sup> By the treatise called the "Guidon,"<sup>b</sup> it is declared, with pirates,  
 that if the master, by connivance with robbers, or by his intreaties, &c.  
 obtains from them any part of the cargo by way of payment of his  
 freight, he shall restore such part to the merchant receiving the  
 freight due in respect of it. And if the robbers pay him the freight  
 of his ship, he shall give an account of the money paid, and the  
 money shall be distributed by way of general average between the  
 goods stolen and the freight of the ship. I have already men-  
 tioned the provision of the English legislature on this subject.<sup>c</sup> If Deviation,  
 the ship be driven into a port out of the course of the voyage by &c. from  
 tempest, or the master sail thither for any of the before men- necessity.  
 tioned reasons, he must wait no longer than necessity requires,  
 but sail again without delay; and for that purpose supply his  
 ship with the requisite necessities or repairs as expeditiously as he  
 can.<sup>d</sup>

If, by reason of the damage done to the ship, or through want Tranship-  
 of necessary materials, she cannot be repaired at all, or not without ment.  
 very great loss of time, the master is *at liberty* to procure another  
 ship to transport the cargo to the place of destination, in order  
 thereby to gain the whole freight:<sup>e</sup> and if the merchant has no  
 agent at the place, it is the master's duty to do this if possible,  
 because he is bound to use every endeavour to preserve the cargo,  
 and convey it to the destined port. So, if the ship has been wrecked,  
 and the cargo saved. And if on the high seas, the ship be in im-  
 minent danger of sinking, and another ship apparently of sufficient  
 ability be passing by, the master may remove the cargo into such  
 ship, and although his own ship happen to outlive the storm, and the  
 other perish with the cargo, he will not be answerable for the loss.  
 Moreover, the master must, during the voyage, take all possible care Care to be  
 of the cargo,<sup>f</sup> and although he is not responsible for injury done to it taken of  
 in consequence of a leak in the ship occasioned by tempest or other cargo.  
 accident; yet, where rats occasioned a leak in the vessel, whereby  
 the goods were spoiled, the master was held responsible for the  
 damage, notwithstanding the crew afterwards, by pumping, &c., did  
 all they could to preserve the cargo from injury.<sup>g</sup> And this deter-

<sup>a</sup> Ord. of the Hanse-towns, art. 35, 36  
 37; Roccus, Not. 70, *ante*, p. 145.

<sup>b</sup> Guidon, ch. 6, art. 2, p. 229.

<sup>c</sup> *Ante*, p. 146.

<sup>d</sup> *Phillips v. Irving*, 8 Sc. N. C. 8,  
 and see p. 86.

<sup>e</sup> Laws of Oleron, art. 4, and Cleirac  
 thereon. French Ord. liv. 3, tit. 3,  
 Fret. art. 11, and Valin thereon. Code  
 de Commerce, art. 296; Molloy, b. 2,  
 ch. 4, s. 5; Ord. of Antwerp, 2 Magena,

p. 14, art. 3; Ord. of Rotterdam, 2  
 Mag. p. 104, art. 147, 148. See also  
 the judgment delivered by Ld. Mans-  
 field in the case of *Luke v. Lyde*, 2  
 Burr. 889; and cases cited *ante*, pp. 82  
 —84.

<sup>f</sup> *Emerigon*, tom. 1, p. 377; and see  
*Davidson v. Gwynne*, 12 East, 381; *La-*  
*veroni v. Drury*, 8 Exch. 166.

<sup>g</sup> *Dale v. Hall*, 1 Wils. 281; *Laveroni*  
*v. Drury*, *supra*.

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mination agrees with the rule laid down by Roccus, who says, if mice eat the cargo, and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault.<sup>a</sup> Yet, if he had cats on board his ship, he shall be excused. This rule, and the exception to it, although bearing somewhat of a ludicrous air, and not strictly the law of England,<sup>b</sup> furnish a good illustration of the general principle, by which the master and owners are held responsible for every injury, that might have been prevented by human foresight or care. In conformity to which principle they are responsible for goods stolen or embezzled on board the ship by the crew or other persons,<sup>c</sup> or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners.<sup>d</sup> So, where in a voyage from H. to G., a vessel was sunk in the river T. by striking against the anchor of another, which anchor lay under water, and without a buoy, whereby some goods in the former were injured, the owners thereof were held responsible for the injury.<sup>e</sup>

Hypotheca-  
tion and  
sale.

If the master, being compelled to take refuge in a foreign port during the course of his voyage<sup>f</sup>, has occasion for money for the repairs of the ship, or other expense necessary to enable him to prosecute and complete the voyage, and cannot otherwise obtain it, he may hypothecate the cargo, or sell a *part* of it for this purpose,<sup>g</sup> but upon the arrival of the ship at the place of destination, the merchant will be entitled to receive the clear value for which the goods might have been sold at that place.<sup>h</sup> If the ship afterwards perish, and reach not the destined port, the ordinance of Wisbuy<sup>i</sup> expressly declares that the money raised by this sale shall be paid to the merchant by the master; and Cleirac, Kurick, Valin, and Pothier agree in opinion that the money is in such a case due not only from the master, but also from the owners, because it was expended for a purpose of which they were, at all events, liable to sustain the charge. But none of the other ordinances contain such a provision, and Emerigon contends on the authority of the Consolato del Mare, and of the ordinances of Oleron and Antwerp, that the money is only payable in case of the safe arrival of the ship, which was the opinion also of several persons whom Pothier consulted. And this doctrine seems the most reasonable, as the merchant is not thereby placed in a worse situation than if his goods had not been sold, but had remained on board the ship. The question has never been determined in this country, but it has been held that the ship is not entitled to the price the goods would have sold for at the port of destination if the ship had not perished.<sup>i</sup>

<sup>a</sup> Roccus, Not. 58, and see Jones on Bailments, p. 105. This rule appears to have been laid down in the Consolato del Mare, and adopted by all foreign writers on this subject. Emerigon, tom. 1, p. 377, 378.

<sup>b</sup> Laveroni v. Drury, 8 Exch. 170.

<sup>c</sup> Roccus, Not. 40; Wellwood, tit. 9, p. 30.

<sup>d</sup> Emerigon, tom. 1, p. 373; Roccus, Not. 55.

<sup>e</sup> Proprietors of the Trent and Mersey Navigation v. Wood, East Ter. 1785, in K. B., 3 Esp. 127.

<sup>f</sup> *Ante*, p. 135.

<sup>g</sup> Richardson v. Nourse, 3 B. & A. 237; Hallett v. Wigram, 9 C. B. 580.

<sup>h</sup> Art. 68. See Emerigon, tom. 2, p. 445, where the several authorities here referred to are cited.

<sup>i</sup> Atkinson v. Stephens, 7 Ex. 567.

Lastly, as to the completion of the voyage. As to the time and CHAP. XII.  
 place of landing goods inwards, the *Customs Consolidation Act* enacts Time and place of landing goods inwards.  
 that no goods, except diamonds, bullion, lobsters, and fresh fish of British taking and imported in British ships, which may be landed without report or entry, shall be unshipped from any ship arriving from parts beyond the seas, or be landed or put on shore on Sundays or holidays, nor shall they be so unshipped, landed, or put on shore on any other days except between the hours of 8 o'clock in the morning and 4 o'clock in the afternoon, from the 1st day of March until the 1st day of Nov., and between the hours of 9 o'clock in the morning and 4 o'clock in the afternoon, from the 1st day of Nov. until the 1st day of March, or during such other hours as may be appointed by the Commrs. of Customs: nor shall any goods be unshipped or landed unless in the presence or with the authority of the proper officer of the Customs, nor shall they be so landed except at some legal quay, wharf, or other place duly appointed for the landing of goods, nor shall any such goods, after having been unshipped or put into any boat or craft to be landed, be transhipped or removed into any other boat or craft previously to their being landed, without the permission of the proper officer of the Customs; and if any such goods shall be unshipped, landed, transhipped, or removed contrary hereto, the same shall be forfeited, and if any goods shall be unshipped or removed from any importing ship for the purpose of being landed, after due entry thereof, such goods shall be forthwith removed to and landed at the wharf, quay, or other place at which the same are intended to be landed; and if such goods are not so removed and landed, the same shall be forfeited, together with the barge, lighter, boat, or other vessel employed in removing the same.<sup>a</sup> As to the report of the cargo of merchant ships, and of ships in commission bringing merchandise from parts beyond the seas: the master of every ship, whether laden or in ballast, shall, within 24 hours after arrival from parts beyond the seas at any port in the U. K., and before bulk be broken, make due report of such ship, under the penalty of 100*l*.<sup>b</sup> So, if commissioned ships, British or foreign, have goods on board, the person in charge is to deliver an account, or forfeit 100*l*., and all such ships are liable to search, as merchant ships are.<sup>c</sup> So, the master of every ship arriving from parts beyond the seas shall at the time of making such report deliver to the collector or comptroller, if Master to deliver bills of lading and answer questions. required, the bill of lading, or a copy thereof, for every part of the cargo laden on board, and shall answer all such questions relating to the ship, cargo, crew, and voyage as shall be put to him by such collector or comptroller; and in case of failure or refusal to answer such questions or answer truly, or to produce such bill of lading or copy, or if any such bill of lading or copy shall be false, or if any bill of lading be uttered or produced by any master, and the goods expressed therein shall not have been *bona fide* shipped on board such ship, or if any bill of lading uttered or produced by any master shall not have been signed by him, or any such copy shall not have been received

<sup>a</sup> s. 49.<sup>c</sup> s. 52.<sup>b</sup> ss. 50, 51.

Abbott on Shipping.

Bulk not to be broken or stowage altered.

Packages reported, "contents unknown," may be opened and examined.

Ship to come quickly to place of unloading, &c.

Officers to board ships.

Master's duty on arrival.

or made by him previously to his leaving the place where the goods expressed in such bill of lading or copy were shipped, or if after the arrival of any ship within four leagues of the coast of the U. K., bulk shall be broken, or any alteration made in the stowage of the cargo of such ship so as to facilitate the unloading of any part of such cargo, or if any part be staved, destroyed, or thrown overboard, or any package be opened, unless accounted for to the satisfaction of the Commrs. of Customs, in every such case such master shall forfeit the sum of 100*l*.<sup>a</sup> If the contents of any package intended for exportation in the same ship shall be reported by the master as being unknown to him, the officers of the Customs may open and examine such package on board, or bring the same to the Queen's warehouse for that purpose; and if there be found in such package any goods which are prohibited to be imported, such goods shall be forfeited, unless the Commissioners of Customs shall permit them to be exported.<sup>b</sup>

The importer, also, of goods intended for home use must, before unshipment, make perfect entry of the goods;<sup>c</sup> but, for the present, I omit this part of the Act.

Again, if any ship, coming into the U. K. or into the Channel Islands, shall not come as quickly up to the proper place of mooring or unloading as the nature of the port will admit, without touching at any other place, and in proceeding to such proper place shall not bring to at the stations appointed by the Commrs. of Customs for the boarding of ships by the officers of the Customs, or if after arrival at such place such ship shall remove from such place except directly to some other proper place of mooring or unloading, and with the knowledge of the proper officer of the Customs, or if the master of any ship, on board of which any officer is stationed neglect or refuse to provide every such officer sufficient room under the deck in some part of the fore-castle or steerage for his bed or hammock, the master of such vessel shall forfeit the sum of 20*l*.<sup>d</sup> The Act also gives the officers of the Customs power to board any ship arriving at any port in the U. K. or the Channel Islands, and freely stay on board until all the goods laden therein shall be duly delivered from the same, and free access to every part of the ship, with power to fasten down hatchways or entrances to the hold, and to mark any goods before landing, and to lock up, seal, mark, or otherwise secure any goods on board such ship.<sup>e</sup> When the ship has arrived at the place of her destination, the master must also take care that she be safely moored or anchored,<sup>f</sup> and without delay deliver the cargo to the merchant or his consignees,<sup>g</sup> upon production of the bills of lading and payment of the freight and other charges due in respect of it; and if

<sup>a</sup> s. 53.

<sup>b</sup> s. 54.

<sup>c</sup> s. 55.

<sup>d</sup> s. 47.

<sup>e</sup> s. 48.

<sup>f</sup> Ord of Wisbuy, art. 36.

<sup>g</sup> This is true as a general rule; the exceptions to the rule arising out of the

power of the consignor to countermand the delivery and stop the goods before they come to the possession of the consignee, will be treated of hereafter under the head of *Stoppage in transitu*. Subject also to the regulations of *The Customs Consolidation Act, 1853, &c. supra*.

by the terms of the charter-party a particular number of days is stipulated for the delivery, either generally or by way of demurrage, he must wait the appointed time for that purpose. These charges are, in ordinary cases, primage and the usual petty average, as expressed in the bill of lading; in case of any loss that became the subject of general average, the civil law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners of the cargo saved, the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose. In this country the payment of general average may be enforced by action, and therefore I apprehend the master has no power to detain the goods on account of it. The cargo (as I have before observed) is bound to the ship, as well as the ship to the cargo;<sup>a</sup> and therefore (unless there is a stipulation to the contrary) the master is not bound absolutely to part with the possession of any part of his cargo until the freight and other charges due in respect of such part are paid. Valin<sup>b</sup> informs us that the entire contents of a single bill of lading are to be considered as one part, although consisting of very different articles; but that the contents of one bill of lading are not bound to the payment due for the contents of another bill of lading, although *consigned to the same person*. In this country, however, it is otherwise.<sup>c</sup> The master, however, cannot detain the goods on board the ship until these payments are made, as the merchant would then have no opportunity of examining their condition. By the Ordinance of Wisbuy<sup>d</sup> and also by the French Ordinance (of 1681),<sup>e</sup> the master may seize and detain the goods in the lighters or barges which are to transport them to the quay, and by the former he may detain the lighters by the ship's side. Cleirac,<sup>f</sup> in his commentary on the laws of Oleron, says that the same power is given by the Ordinance of Philip the 2nd, and by the Consolato del mare; and that the latter allows him to detain goods equal in value to four times the amount of the freight. The Ordinance of Rotterdam<sup>g</sup> allows the master to detain the goods for his freight, but requires him to unload and take care of them, that they may not be diminished or spoiled. In England the practice is to send the goods to a wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment. And by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his *lien* or hold upon the goods, and cannot afterwards reclaim them.<sup>h</sup> If the cargo be landed, in pursuance of an Act of Parliament, the right of *lien* is not lost.<sup>i</sup> The baggage of a passenger may be detained for his passage-money.<sup>k</sup> The manner of

CHAP. XII.

Master's  
duty to de-  
liver, &c.Lien on  
cargo, &c.

<sup>a</sup> Roccus, Not. 88; *Code de Commerce*, art. 306; 2 Magens, p. 106, art. 156.

<sup>b</sup> Valin on the French Ord. tom. 1, p. 668.

<sup>c</sup> See Sodergren v. Flight, cited in 6 East, 622.

<sup>d</sup> Art. 57.

<sup>e</sup> Liv. 3, tit. 3, Fret. art. 23; see *Code de Commerce*, art. 306.

<sup>f</sup> Art. 21, note 3, p. 72.

<sup>g</sup> Art. 157, 158, 2 Magens, 106.

<sup>h</sup> By the *Code de Commerce*, art. 306 & 307; the preference continues for a fortnight after they have been delivered, provided they have not in the meantime passed into the hands of third persons.

<sup>i</sup> Wilson v. Kymer, 1 M. & S. 157.

<sup>k</sup> Wolf v. Summets, 3 Camp. 631.

|                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Abbott on Shipping.</i>       | delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the Customs regulations, the custom of particular places, and the usage of particular trades. <sup>a</sup> Thus a hoyman, who brings goods from an outport into the port of London, <sup>b</sup> is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment. And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at London, <sup>c</sup> the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. But in the case of ships coming from a foreign country, delivery at a wharf in London discharges the master. <sup>d</sup> If the consignee send a lighter to fetch the goods, the master of the ship is obliged by the custom of the river Thames to watch them in the lighter until the lighter is fully laden, and until the regular time of its departure from the ship is arrived; <sup>e</sup> and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it. In the case of ships coming from Turkey, and obliged to perform quarantine before their entry into the port of London, <sup>f</sup> it is usual for the consignee to send down persons at his own expense, to pack and take care of the goods; and therefore where a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held that he had no right to call upon the master of the ship for a compensation. |
| Mode of delivery.                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Delivery at a wharf.             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Lighters, &c.                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Warehousing without examination. | <i>The Customs Consolidation Act, 1853</i> , also contains, as we have seen, some important regulations on this head. It declares that if any goods shall be removed from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, or if any goods entered to be warehoused or to be re-warehoused, shall be carried into the warehouse, unless with the authority or under the care of the proper officer of Customs, and in such manner, by such persons, within such time, and by such roads or ways as such officer shall direct, such goods shall be forfeited. <sup>g</sup> If the importer of any goods shall not, within 14 days (exclusive of Sundays and holidays) after the arrival of the ship importing the same, make perfect entry or entry by bill of sight of such goods, or if, having made such entry, he shall not land such goods within such 14 days, or within such further period as the Commrs. of Customs shall direct, the officers of the Customs may convey such goods to the Queen's warehouse; and whenever the cargo of any ship shall have been discharged                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Entry, landing, &c., time for.   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

<sup>a</sup> See Valin on the French Ordinance, tom. 1, p. 530.

<sup>b</sup> Wardell v. Mourillyan, 2 Esp. 693; *sed qu.* Gatliff v. Bourne, 8 Sc. N. R. 604.

<sup>c</sup> Syeds v. Hay, 4 T. R. 260.

<sup>d</sup> By Buller, J. *Arguendo* in the case of Hyde v. Trent and Mersey Navig. Comp. 5 T. R. 397; that is, at a wharf

where the usage of trade makes the delivery there a delivery to the consignee, Gatliff v. Bourne, *supra*.

<sup>e</sup> Catley v. Wintringham, Peake's N. P. 150.

<sup>f</sup> Dunnage v. Jolliffe, coram Kenyon Ch. J. at Guildhall, Sit. p. Mich. T. 1789.

<sup>g</sup> 16 & 17 Vict. c. 107, s. 86.

within such 14 days, with the exception only of a small quantity of goods, the officers of the Customs may forthwith convey such remaining goods to the Queen's warehouse; and also at any time after the arrival of such ship may convey any small packages or parcels of goods therein to the Queen's warehouse, there to remain for due entry during the remainder of such 14 days; and if the duties due upon any goods so conveyed to the Queen's warehouse shall not be paid within 3 months afterwards, or within such further period as the said Commrs. may direct, together with all charges of removal and warehouse rent, such goods may be sold, and the produce thereof applied, first to the payment of freights and charges, next of duties, and the overplus, if any, shall be paid to the proprietor of the goods on his application for the same; but if such goods, or any of them, shall be of a perishable nature, the Commrs. of Customs may forthwith direct sale thereof, and apply the proceeds in like manner: provided always, that for this purpose, if the importing ship and goods be liable to the performance of quarantine, the time for entry and landing of such goods shall be computed from the time at which such ship and goods shall have been released from quarantine: provided always, that if 48 hours or any earlier period after the report of any ship is specified in the bills of lading for the discharge of her cargo, or any part thereof, and the importer, owner, or consignee of such goods, or his agent, shall neglect to enter and land the same within such 48 hours, at any port or place approved by the Commrs. of Customs, the master or owner of such ship may, immediately on the expiration of such 48 hours, enter and land such goods.<sup>a</sup> Whenever any goods shall remain on board any importing ship beyond the period of 14 days after the arrival of such ship, or beyond such further period as the Commrs. of Customs may allow, such ship shall be detained by the proper officer of Customs until all expenses of watching or guarding such goods beyond such 14 days, or such further time, if any, allowed, as aforesaid, not exceeding 5s. per diem, and of removing the goods or any of them, to the Queen's warehouse, in case the officers shall so remove them, be paid.<sup>b</sup>

<sup>a</sup> s. 74.<sup>b</sup> s. 75.



## CHAPTER XIII.

## OF THE CAUSES WHICH EXCUSE THE OWNERS AND MASTER.

It has been already intimated that a carrier is in general excused for a non-performance of the contract on his part, occasioned by any event falling within the meaning of the expressions *act of God* and *the Queen's enemies*.<sup>a</sup> The expression *act of God*<sup>b</sup> denotes natural accidents, such as lightning, earthquake, and tempest; and not accidents arising from the fault or negligence of man; for which it has been already shown that the master and owners, like other common carriers, are sometimes answerable, although no actual blame may be imputable to them; for in considering whether they, or other carriers, are chargeable for any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which either, according to the general rules of law, or the particular contract of the parties, afford an excuse for the non-performance of the contract.<sup>c</sup>

Owners'  
liability.

At common law the owners, in their character of *common carriers*, are insurers, and responsible for every loss, except what arises from the act of God and the Queen's enemies. This common-law liability, however, is usually restricted by express stipulations, introduced into the charter-party or into the bill of lading; and has also, in certain cases, been limited by statute law. The bill of lading usually contains, as already stated, the following clause:—*The act of God, the Queen's enemies, fire and all and any other dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever excepted.*<sup>d</sup> The two first are the common-law exceptions; that of fire is by the 26 Geo. 3, c. 86, s. 2, and the residue by the bill of lading. The other statutory exceptions are robbery, embezzlement, incapacity or want of pilot, and the like.

Perils of  
the sea.

The only exception formerly made in the common bill of lading, as already stated, was of *the perils of the sea*,<sup>e</sup> which words certainly denote the natural accidents peculiar to that element, and in more than one instance have been held to extend to an event not attributable to natural causes. In the present chapter I shall consider the meaning of this extensive phrase, *perils of the sea*, and then proceed to mention other excuses, which the wisdom of the Legislature has from time to time introduced. In considering this subject,

<sup>a</sup> P. 175. In the preamble to the stat. 26 Geo. 3, c. 86, the cases in which the master and owners are exempted from responsibility, are expressed to be, *accidents by the King's enemies, the perils of the sea, or the act of God.*

<sup>b</sup> Trent and Mersey Navig. Comp. v. Wood, 3 Esp. 127; Forward v. Pit

tard, 1 T. R. 27.

<sup>c</sup> Gosling v. Higgins, 1 Camp. 451; Bowcher v. Noidstrom, 1 Taunt. 568; Smith v. Shepherd, Abb. on Shipp. (edit. 1802) 203 n.

<sup>d</sup> Ante, p. 175.

<sup>e</sup> See Laurie v. Douglas, 15 M. & W. 46.

the first question that presents itself to the mind of an English lawyer, is, how is the question of peril of the sea to be decided? The particular manner in which a loss happens, must always be a question of fact, but, admitting it to have happened in a particular manner, is the judge, before whom a cause is tried, to pronounce whether that manner be a peril of the sea, or are the jury to declare it by their verdict? The rule, as already given,<sup>a</sup> but which I will repeat, is this:—when a question arises on the construction of a document, without reference to any extrinsic evidence to explain it, the construction of the document is for the judge, and not for the jury: but if parol evidence be required to explain it, as in mercantile contracts, in which peculiar terms are employed, these facts are for the jury.<sup>b</sup> In the case of *Pickering v. Barkley*,<sup>c</sup> the ship had been overpowered and plundered on the high seas by pirates, and the question was, whether the owners were answerable for the goods; and it was determined that they were not answerable, *because* (says the reporter) *the taking by pirates was accomplished a peril of the sea*. This determination agrees with the rule of the civil law:<sup>d</sup> and in the case cited in the preceding chapter,<sup>e</sup> in which the owners were held responsible for goods taken by robbery from the ship in the river T. within the body of a county, Ch. Just. Hale took notice of this doctrine, and said, “by the civil admiral law the owners are not responsible for a robbery by pirates at sea.” This, however,<sup>f</sup> is to be understood only in case the ship does not fall into the hands of pirates by any negligence or fault of the master. In a case which came before the Court of K. B., a short time before the alteration of the bill of lading,<sup>g</sup> and which was an action brought to recover the value of goods, for which the master had signed a bill of lading containing an exception only of the perils of the sea, although made during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the court, whether a loss so occasioned were within the meaning of this exception, and the cause never proceeded to a final judgment. The express exception in this case afforded room to contend, that the exception of the act of the King’s enemies, which arises out of general rules of law, was meant to be excluded in the particular instance. In another case (*Buller v. Fisher*),<sup>h</sup> the ship, in which the goods were conveyed, was run down in daylight, and not in a tempest, by one of two other ships, that were sailing in an opposite direction to her, both of which kept to windward, as did

<sup>a</sup> *Ante*, p. 26.

<sup>b</sup> *Morrell v. Frith*, 3 M. & W. 405; see also notes to *Wigglesworth v. Dallison*, 1 Smith’s L. C. 307.

<sup>c</sup> *Pickering v. Barkley*, 2 Roll. Abr. 248.

<sup>d</sup> Dig. 4, 9, 3, 1. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquam exceptionem ei dari.

<sup>e</sup> *Morse v. Slue*, 1 Vent. 130.

*Emerigon*, tom. 1, p. 532; see *De Rothschild*, R. M. S. P. Co. 7 Exch. 734.

<sup>g</sup> *Bever v. Tomlinson*, East, T. 36 Geo. 3. The case came before the court on a motion for a new trial: the court directed a new trial, in order that the facts might be put upon the record, but it never came on again.

<sup>h</sup> 5 Esp. 67.

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Shipping.

also the defendant's ship, but it was matter of so much doubt whether the master of the defendant's ship ought to have understood the course which the others would pursue, and have borne to leeward to avoid them, that no blame was considered to be imputable to him for not having done so, nor was any fault attributable to the persons who had the conduct of either of the other ships. This loss was therefore held to fall within the meaning of this exception, and to have happened by a peril of the sea. It may be proper to point out the distinction between this case and the case of the vessel that struck against the anchor of another to which there was no buoy, which I have mentioned in a preceding page.<sup>a</sup> In this case there was no fault or negligence in the persons belonging to either vessel; in the other, both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it, as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it be taken that negligence was imputable only to the master, who had left his anchor without a buoy, then he was answerable over to the master and owners of the vessel, whose cargo had been injured: and indeed the accident happened in the course of a navigation, to which the exception of the perils of the sea did not apply. But not every loss proceeding directly from natural causes, is to be considered as happening by a peril of the sea. If a ship perish in consequence of striking against a rock or shallow, the circumstances, under which the event takes place, must be ascertained in order to decide, whether it happen by a peril of the sea or by the fault of the master. If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if a ship is forced upon such a rock or shallow by adverse winds or tempest,<sup>b</sup> or if the shallow was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God or the perils of the sea. In the case referred to in the beginning of this chapter,<sup>c</sup> *Ld. Kenyon* observed, that if an earthquake had removed the bank at the time of the accident, the master would have been excused. If a vessel, reasonably sufficient for the voyage, be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril: this was decided in the case of a hoy driven by a sudden gust of wind against the pier of a bridge, through which it attempted to pass, and thereby sunk in consequence of a shock that a stronger vessel might have sustained without sinking.<sup>d</sup> But having already gone very minutely into the question of loss by *perils of the sea*, as affecting policies of insurance,<sup>e</sup> I will content myself now with a bare reference to the former passage. From the preceding observations and authorities it will be obvious that neither the master nor owners can be answerable for a loss happening to the cargo

Lightning.

<sup>a</sup> *Trent Nav. Co. v. Wood*, 3 Esp. 127.

<sup>b</sup> *Roccus*, Not. 55; *Strac. de Nautis*, p. 3, n. 32.

<sup>c</sup> *Smith v. Shepherd*, ante, p. 198.

<sup>d</sup> *Amies v. Stevens*, 1 Stra. 128; Bull. N. P. p. 70.

<sup>e</sup> P. 25.

by lightning. Yet upon the principle upon which the decisions Ch. XIII. are founded, they must be answerable for a loss by *fire* proceeding Fire. from any other cause, whether originally commencing in their own ship or communicated to it from another. And in the case of an inland carrier,<sup>a</sup> this point has been solemnly decided, and the law remains unaltered.<sup>b</sup> But by a statute made in the very same year in which the point was first decided,<sup>c</sup> it is enacted, "That no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever, which from and after the first day of September, 1786, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." In this clause the master is not mentioned; and therefore it may be doubtful whether his responsibility is in this case removed by the statute: but the insertion of the word *fire* in the modern bill of lading has certainly removed it. In *Morewood v. Pollak*,<sup>d</sup> goods were delivered at M. to the owners of the ship B., to be conveyed on board the ship B., and then to be carried in her to L. The goods were destroyed by a casual fire on board a lighter employed by the owners of the B. to convey them from M. to the ship B.:—held, that this statute did not protect the owners of the B., as the fire was not on board their ship.

By another section of the same statute,<sup>e</sup> reciting, "that disputes Liability for may arise, whether the owners or masters of ships are liable to jewels, &c. answer or make good the value or amount of any gold, silver, diamonds, watches, jewels, or precious stones, which may be lost after the same have been put on board their ships on freight, without the shippers thereof declaring at the time the value of such goods," it is enacted, "That no master, owner, or owners, of any ship or vessel, shall be subject or liable to answer for or make good, to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which, from and after the passing of this Act, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners, of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones."

<sup>a</sup> *Forward v. Pittard*, 1 T. R. 27.

<sup>b</sup> *Hyde v. Trent & M. N. Co.* 5 T. R. 389; *Bourne v. Gatliff*, 8 Sc. N. R. 604. But a warehouseman is not answerable for any loss by fire. *Garside v. Trent & M. N. Co.* 4 T. R. 581. Nor is the hirer of goods answerable, per *Kenyon*, Ch. J. *Sit. at West. p. E. T.*

1790; *Longman v. Galini*, in the case of musical instruments hired to be used at the Opera House and destroyed by fire there. See *Cording's case*, 4 B. & Ad. 198.

<sup>c</sup> 26 Geo. 3, c. 86, sect. 2.

<sup>d</sup> 1 E. & B. 743.

<sup>e</sup> s. 3.

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## CHAPTER XIV.

### LIMITATION OF THE RESPONSIBILITY OF THE OWNERS AND MASTER.

IN considering the instances in which the owners are answerable to the merchant for the loss or damage of his goods, I have hitherto foreborne to mention the *limits* of their responsibility, and have treated them as being responsible up to the full extent of the amount of such loss or damage; and so both by the civil law and by the common law of England they formerly were.<sup>a</sup> For although it was decided at a time when the ransom of ships taken by a foreign enemy was not contrary to the laws of the realm,<sup>b</sup> that such ransom could not be made at a price exceeding the value of the ship and cargo (and the loss of the value of the cargo would fall upon the merchants), yet, until the responsibility of the ship-owner for the loss or damage of goods was limited by statute, it was never doubted but that such responsibility was co-extensive with the loss, and the statutes which have been made to narrow it are founded upon that supposition. The ancient laws of Oleron, Wisbny, and the Hanse Towns, contain no provision on this subject. Nor is any alteration of the rule of the civil law noticed by Roccus, although Vinnius, an earlier author, says, that by the law of Holland the owners are not chargeable beyond the value of the ship and the things that are in it;<sup>c</sup> in conformity to which principle the French Ordinance (of 1681) declared, "that the owners of ships shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing their ship and the freight."<sup>d</sup> A similar provision is contained in the Ordinance of Rotterdam, made in 1721, which declares, "That the owners shall not be answerable for any act of the master done without their order, any further than their part of the ship amounts to."<sup>e</sup> And by other articles of the same Ord. it appears that each part-owner is liable only for the value of his own share.<sup>f</sup> Valin, in his commentary on the French Ord.,<sup>g</sup> informs us, that the same regulations are also established at Hamburgh.<sup>h</sup> The earliest provision of the British Legislature on this subject is a statute made a few years after the date of the Ord. of Rotterdam, and which was passed in consequence of a petition presented to the House of Commons by several merchants, and other persons,

<sup>a</sup> The *Volant*, 1 Wm. Rob. 387; *Wilson v. Dickson*, 2 B. & A. 2; *Gale v. Laurie*, 5 B. & C. 164.

<sup>b</sup> *Helley v. Grant*, and *Graham v. Hall*, cited 1 T. R. 79.

<sup>c</sup> In *Peckium*, p. 155, published in 1647, the author cites *Grotius*, Lib. 3, Intr. ad Jur. Bat. c. 1, and lib. 2 De Jure Belli et Pacis, c. 11, n. 13.

<sup>d</sup> Liv. 2, tit. 8, des Proprietaires, art. 2. The encouragement of maritime commerce, especially among the noblesse,

was one of the principal objects of this Ord. See same book and tit. art. 1, and Valin's pref. to that title; see *Code de Commerce*, art. 216.

<sup>e</sup> Art. 167, 2 Magens, 107.

<sup>f</sup> Art. 126, 127, 2 Mag. 101, 102.

<sup>g</sup> Tom. 1, p. 569.

<sup>h</sup> An extract from the Ord. of Hamburgh, dated 1731, is given in 2 Mag.; but the article containing this provision is not noticed.

owners of ships belonging to the port of London,\* setting forth the alarm of the petitioners at the event of a late action, in which it was determined that the owners were answerable for the value of merchandise *embezzled* by the master. The foundation of this limitation is mentioned in the preamble of the statute. It then enacts, that no owner shall be liable to answer for or make good any loss or damage by reason of any embezzlement, secreting, or making away with by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter or thing, damage or forfeiture, done, occasioned, or incurred, by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage, wherein such embezzlement, secreting, or making away with as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done; any law, usage, or custom to the contrary thereof in anywise notwithstanding.<sup>b</sup> If several freighters sustain losses exceeding in the whole the value of the ship and freight, they are to receive compensation thereout in proportion to their respective losses: and any one freighter, on behalf of himself and the other freighters, or any part-owner, on behalf of himself and the other part-owners, may file a bill in a court of equity for the discovery of the total amount of the losses, and of the value of the ship, and for an equal distribution and payment.<sup>c</sup> If such bill is filed by or on behalf of the part-owners, the plaintiff must make affidavit that he does not collude with the defendants, and must offer to pay the value of the ship and freight, as the court shall direct.<sup>d</sup> Nothing in the Act extends to impeach, lessen, or discharge any remedy, which any person may have against all, every, or any the master and mariners of such ship or vessel, for or in respect of any embezzlement, secreting, or making away with any gold, silver, diamonds, jewels, precious stones, or merchandise, shipped or loaded on board such ship or vessel, or on account of any fraud, abuse, or malversation of and in such master and mariners respectively; but that every person so injured or damaged may pursue and take such remedy for the same, against the said master and mariners respectively, as he or they might have done before the Act.<sup>e</sup> By this statute, therefore, the legal responsibility of the *master* is left unaltered in all the cases before enumerated, and that of the *owners* also in the case of a robbery committed by persons *not* belonging to the ship. But where a ship in the river T. was forcibly plundered of dollars during the night by a gang of robbers, in consequence of information given by one of the mariners of the ship, who afterwards shared the booty, the responsibility of the

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\* See Commons' Journals for the year 1733, p. 277. The case referred to by the petition appears clearly to be that of *Boucher v. Lawson*, Cas. temp. Hardw. 85. The bill went through both houses without a division: The clauses directing proportional compensation and relief in

equity were introduced in the House of Lords.

<sup>b</sup> 7 Geo. 2, c. 15, s. 1.

<sup>c</sup> Ib. s. 2.

<sup>d</sup> Ib. s. 3.

<sup>e</sup> Ib. s. 4.

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owners was held not to extend beyond the value of the ship and freight by virtue of this statute.<sup>a</sup> Immediately after the decision of this case, and in consequence of the danger to which the facts that were disclosed in it showed the owners to be exposed, another petition was presented to the House of Commons<sup>b</sup> on behalf of several owners of ships belonging to London and other parts, and in compliance therewith, another statute was passed,<sup>c</sup> fixing the same limits to the responsibility of the owners in the several cases mentioned in the preceding statute, and also in the case of robbery, *although the master or mariners shall not be in anywise concerned in or privy to such robbery, embezzlement, secreting, or making away with.* This statute also contains the same provisions as the preceding Act, for equal distribution, and discovery by bill in equity, and also for remedy against the master and mariners: and, as was mentioned in the preceding chapter,<sup>d</sup> has entirely taken away the responsibility of the owners in the case of loss or damage by fire. It may be observed that, in those parts of each of these statutes which treat of the damage and responsibility, the words *owner or owners of any ship or vessel* are used, and not the word *part-owner*, although the part-owner by name is enabled to file a bill in equity on behalf of himself and all the other part-owners. And therefore it was once a question whether, if any one part-owner should be privy to an act of mal-practice, and so clearly be excluded from the benefits of the statute, the other part-owners would be excluded also. But it is now clear that, if the loss be occasioned by the misconduct of one of several, who is both master and *part-owner*, the others are not liable, as owners, beyond the value of the ship and freight.<sup>e</sup> The master, *when sued as part-owner*, is equally protected. The statute protects *all* the owners, the master included, when so sued. To make the master, when part-owner, liable at common law, he must be sued as master, and not as part-owner. And the common-law liability is still further restricted by the 53 Geo. 3, c. 159. By this, no owner is liable for any act, neglect, matter, or thing done, &c., without their fault and privity, to goods, &c., further than the value of the ship and freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage.<sup>f</sup> *Freight* is here defined to mean, the value of the carriage of goods belonging to any of the owners of the ship, and also the hire due, or to grow due, under any contract, except only such hire, as in the case of a ship hired for time, may not begin to be earned, until the expiration of six calendar months after the loss.<sup>g</sup> Losses hap-

<sup>a</sup> *Sutton v. Mitchell*, 1 T. R. 18.

<sup>b</sup> See Commons' Journals for the year 1786, p. 296. This Act also was passed without a division in either House of Parliament.

<sup>c</sup> 26 Geo. 3, c. 86, s. 1.

<sup>d</sup> *Ante*, p. 201.

<sup>e</sup> *Wilson v. Dickson*, 2 B. & A. 13; *the Volant*, 1 W. Rob. 387; see also 53 Geo. 3, c. 159.

<sup>f</sup> See *Ex parte Rayne*, 1 Q. B. 982;

*Atkinson v. Stephens*, 7 Exch. 567.

See *Dobree v. Schroder*, 6 Sim. 291; *Wilson v. Dickson*, 2 B. & A. 2; *Gale v. Laurie*, 5 B. & C. 164; *Cannan v. Meaburn*, 1 Bing. 465; *the Volant*, 1 W. Rob. 387; *Brown v. Wilkinson*, 15 M. & W. 391.

<sup>g</sup> 53 Geo. 3, c. 159, s. 2. Money actually paid in advance is to be included as freight, *Wilson v. Dickson*, *supra*.

pening by more than one separate accident, or on more than one occasion, in the course of a voyage, or in the interval between two voyages, are to be compensated for in the same way and to the same extent as if no other loss had happened during the same voyage, or in the same interval.<sup>a</sup> The Act is not to extend to any vessel used solely in rivers or inland navigation, or to any ship or vessel not duly registered.<sup>b</sup>

Owners are responsible to the value of the ship and its appurtenances, together with the freight and the costs which may have been incurred.<sup>c</sup> The value of the ship and freight may be ascertained by appraisal or by consent.<sup>d</sup> The Admiralty Court, in general, orders the owners of the offending vessel to pay the freight earned into Court.<sup>e</sup>

The value of the ship is to be estimated at the time of the loss, and not at the time of the commencement of the voyage.<sup>f</sup> Whatever is on board for the object of the adventure belonging to the owners is, within the meaning of the statute, part of the ship.<sup>g</sup>

## CHAPTER XV.

### GENERAL DUTIES OF THE MERCHANT.

THE general duties of the merchant (those only excepted, which relate to the payment of freight and of gross average, and which will form the subject of distinct chapters) are comprised in a very narrow compass: the hirer of anything must use it in a lawful manner, and according to the purpose for which it is let. The merchant must lade the ship within the time, and with the cargo agreed upon; he must put on board no prohibited or unaccustomed goods, by which she may be subjected to detention or forfeiture,<sup>h</sup> and he must do all that is required of him by the Customs, and the like. In general, even in the case of affreightment by charter-party, the command of the ship is reserved to the owners or the master appointed by them, and therefore the merchant has not the power or opportunity of detaining the ship beyond the stipulated time, or employing it in any other than the stipulated service. But by the charter-parties under which ships were let to freight to the E.I. Co., the command and disposal of the ship were reserved to the Co., and the master, although appointed by the owners, was bound to obey the orders of the Co. at home, and of their factors and servants abroad; and it was always stipulated<sup>i</sup> that nothing should be paid by the Co. for freight or demurrage, unless the ship returned home in

<sup>a</sup> Sect. 3.

<sup>b</sup> Sect. 5; and see *Hunter v. M'Gown*, 1 Bligh. 573.

<sup>c</sup> *The Mellona*, 3 Wm. Rob. 21.

<sup>d</sup> *Ib.*

<sup>e</sup> *Ib.*

<sup>f</sup> See *Ante*, p. 204, n. (g.)

<sup>g</sup> *Ib.*; and see *Gale v. Laurie*, 5 B. & C. 156; the *Mary Caroline*, 3 Wm. Rob. 101; the *Columbus*, *Ib.* 162.

<sup>h</sup> *Roccus*, Not. 85, Dig. 19, 2, 61, 1; French Ord. liv. 3, tit. 3, Fret. art. 9; *Code de Commerce*, art. 216.

<sup>i</sup> See *Hotham v. E. I. Co.* 1 T.R. 688.



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safety. Yet in a case<sup>a</sup> where the Co. detained a ship so long in India, that she became unfit for the voyage home, and was disposed of there, so that by reason of the particular stipulation the owners could sustain no action at law upon the contract, a court of equity ordered the Co. to make a proper allowance for the actual and probable earnings and the value of the ship. So where a ship hired by the Co. to be employed according to the then usual terms of their charter-parties in trade and warfare, was sent upon a service of observation and discovery to explore the passage to the eastward of the Isle of Banca, and there struck on a rock, and was lost, and the owners brought an action against the Co. for thus exposing the ship to danger in a service not warranted by the charter-party without their knowledge or consent, *Ld. Kenyon*, before whom the cause was tried,<sup>b</sup> declared himself to be of opinion that the action was proper in point of general principle, but the plaintiffs failed in their suit, because it appeared that the Co.'s intention to employ the ship in this service was, before her departure from England, made known to the person who managed the ship on behalf of the owners, and not objected to on their part.

When merchant fails to lade ship.

Some of the ancient maritime codes and more modern foreign ordinances<sup>c</sup> have fixed the payment to be made by the merchant, who, having taken a ship to freight, declines to lade her in pursuance of his agreement, or who, before the commencement, or during the course of the voyage withdraws his goods from the ship, or having hired a ship to go to a distant port and engaged to furnish a cargo homeward, fails to do so, whereby the ship is forced to return empty; and have decided that in some instances the whole, in others a moiety, of the sum that would have become due as freight, shall be paid as a compensation to the owners. But in all these cases the law of England leaves the amount of the compensation to be ascertained by a jury, if the parties cannot agree about it: and a jury will form their estimate upon the consideration of all the circumstances of the case, and of the real injury sustained by the owners, which cannot be properly settled by positive rules.

Primage.

We have seen by a copy of the bill of lading that the master undertakes to deliver the goods upon the payment of freight with primage and average accustomed.<sup>d</sup> The word primage denotes a small payment to the master for his care and trouble, which he is to receive to his own use unless he has otherwise agreed with his owners.<sup>e</sup> This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. In the treatise called the "Guidon" it is called, *la contribution des chausses ou pot de vin du maître*. It is sometimes called the master's hat money. The word

Average.

<sup>a</sup> *Edwin v. E. I. Co.* 2 Vern. 210.

<sup>b</sup> *Lewin v. E. I. Co.* Peake N. P. 241. It was an action upon the case, and the plaintiffs were nonsuited; they afterwards brought another action in the Court of C. P., which was tried before *Ld. Eldon* at the Sit. after H. T. 1800, and were again nonsuited on the same ground. The terms of the charter-parties were afterwards altered, and the ships

were hired to be employed in trade and in warfare, and on any other service whatsoever.

<sup>c</sup> Ord of the Hanse Towns, art. 11; French Ord. liv. 8, tit. 3, Fret. art. 3 & 6 and 8 & 9, and Valin thereon, Guidon, ch. 9, art. 11; *Code de Commerce*, art. 287.

<sup>d</sup> P. 175.

<sup>e</sup> *Best v. Sanders, M. & M.* 208.

primage in this place denotes several petty charges, which are to be borne partly by the ship and partly by the cargo, such as the expense of towing, beaconage, &c. Some of the foreign ordinances specify the particulars that fall under this head, and the mode of distributing the charge, but with us they depend entirely upon usage, and an attempt to enumerate them would afford neither instruction or entertainment.

This and the preceding article of primage are often commuted for a specific sum or a certain percentage on the freight.

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## CHAPTER XVI.

### PAYMENT OF FREIGHT.

In treating of the payment of the freight, the principal duty of the merchant, I shall consider, 1st, the cases in which the entire freight is to be paid according to the terms of the contract, and 2nd, those in which a part only of the stipulated sum may be claimed. The Contract, in contract for the conveyance of merchandise is in its nature an entire general, entire contract: and, unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed are exceptions to the general rule, founded upon the language of the contract,<sup>b</sup> or upon principles of equity and justice, as applicable to particular circumstances. But although the delivery of the goods at the place of destination is, in general, necessary to entitle the owner to the freight, yet with respect to living animals, whether men or cattle, which may frequently die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said,<sup>c</sup> that if there be no express agreement whether the freight is to be paid for the lading or for the transporting them, freight shall be paid as well for the dead as for the living. If the agreement be to pay freight for the lading them, their death certainly cannot deprive the owners of the freight; but if the agreement be to pay freight for transporting them, then no freight is due for those that die on the voyage, because as to them the contract is not performed.<sup>d</sup> These distinctions are found in the civil law, and adopted by all the writers on this subject. In this

Exceptions.

<sup>a</sup> French Ord. 1681, liv. 3, tit. 7; Avaries, art. 8 & 9; Code de Commerce, tit. Avaries, and Du fret ou nolis, art. 286; 2 Magens, 277; Ord. of Wisbuy, art. 44, 56, 59, 60; Guidon, chap. 5, art. 12 to 19, and Cleirac on the 24th

art. of the Laws of Oleron.

<sup>b</sup> Crozier v. Smith, 1 Sc. N. R. 343; De Silvale v. Kendall, 4 M. & S. 37.

<sup>c</sup> Dig. 14, 2, 10; Roccus, Not. 76, 77, 78; Molloy, b. 2, ch. 4, s. 8.

<sup>d</sup> See Moffatt v. E. I. Co. 10 East, 468.

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country it is not unusual to pay for goods shipped for the E. or W. Indies at the time of the shipment. But this payment, although commonly called freight, is not strictly or properly so denominated; that word denoting the price rather of actual carriage, than of receiving goods in order to be carried: and therefore in a case before the Court of C. P.,<sup>a</sup> the Court, admitting that an action might be brought for money agreed to be paid for receiving goods on ship-board in order to be transported, decided that such money could not be sued for or recovered by the name of freight. If it be intended that money advanced shall be an advance in part-payment of the freight, such intention must be clearly expressed in the charter-party.<sup>b</sup> Money paid in advance of freight cannot be recovered back.<sup>c</sup> If a pregnant woman be delivered during the voyage no freight is due for the infant.<sup>d</sup> When goods are sent in a general ship in pursuance of the second species of contract before mentioned, the amount of the freight is either settled by the agreement of the parties or by the usage of the trade. In the case of a charter-party, if the stipulated payment is a gross sum for an entire ship, or an entire part of a ship, for the whole voyage; the gross sum will be payable although the merchant have not fully laden the ship.<sup>e</sup> And if a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage, the payment must be according to the number of tons, &c., which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant. On the other hand,<sup>f</sup> if the merchant has stipulated to pay a certain sum per cask or bale of goods, the payment must be in the first place according to the number of the casks or bales shipped and delivered,<sup>g</sup> and if he has further covenanted to furnish a complete lading, or a specific number of casks or bales, and failed to do so, he must make good the loss, which the owners have sustained by his failure, to be settled, in case of disagreement, by a jury, who will take all the circumstances into their consideration.<sup>h</sup> In *Cockburn v. Alexander*,<sup>i</sup> a ship was chartered to *Port Philip*, and there load "a full and complete cargo of wool, tallow, bark, or other legal merchandise, the quantity of bark not to exceed 100 tons, and the quantity of tallow and hides not to exceed 80 tons, and was to proceed therewith to London, and deliver the same, on being paid freight, as follows:—for wool 1½d. per lb. pressed, and 1¼d. and one-eighth of a penny per lb. unpressed, gross weight; tallow, 3l. per ton; bark, 4l. per ton; and hides, 2l. per ton—the latter not to exceed 20 tons without consent of the captain, &c.; one-third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash or approved bills, at two months following:"—held, that the

<sup>a</sup> *Blakey v. Dixon*, 2 B. & P. 321; *Andrew v. Moorhouse*, 5 Taunt. 435, *dist.*; *Maashiter v. Buller*, 1 Camp. 84.

<sup>b</sup> *De Silvale v. Kendall*, 4 M. & S. 37; *Manfield v. Maitland*, 4 B. & A. 582.

<sup>c</sup> *Saunders v. Drew*, 3 B. & Ad. 445.

<sup>d</sup> *Roccus*, Not. 79; *Molloy*, b. 2, ch. 4, s. 8.

<sup>e</sup> *Roccus*, Not. 72, 75; see *Mitchell v. Darthez*, 2 Bing. N. C. 555.

<sup>f</sup> *Roccus*, Not. 73, 75.

<sup>g</sup> *Roccus*, n. 73.

<sup>h</sup> See *Puller v. Staniforth*, 11 East, 232; *Irving v. Clegg*, 1 Bing. N. C. 53; *Capper v. Forster*, 3 Ib. 946.

<sup>i</sup> 6 C. B. 791; *Warren v. Peabody*, 8 Ib. 800.

freighter was entitled to load the ship with an assorted cargo of any *legal merchandise*; but that the owners were entitled to be paid freight upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz., 100 tons of bark, 60 tons of tallow, and 20 tons of hides, and the residue of wool, pressed or unpressed. Held also, that parol evidence was not admissible to show that, by the custom of the place of loading, the cost of pressing was to be borne by the shipowner. Where a ship hired to go beyond the sea, to fetch home a cargo for which a certain rate per ton was to be paid, nothing being payable for the outward voyage, was forced to return in ballast, the merchant's factor having no goods to put on board, the Court of Chancery decreed payment of the freight.<sup>a</sup> If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, &c., of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped.<sup>b</sup> Again, when the payment is to be made by cask or bale, the merchant must pay for what has actually been brought, although the agreement was to load a full cargo, which the master refused to do.<sup>c</sup> In all the instances before mentioned the owners take upon themselves the chance of the long or short duration of the voyage. But if the merchant engage to pay a certain sum for every month, week, or other portion of the voyage, in this case, the risk of the duration falls upon the merchant: and if no time be fixed for the commencement of computation, the computation will begin from the day on which the ship breaks ground and commences the voyage, and will continue during the whole course of the voyage, and during all unavoidable delays, not occasioned by the act or neglect of the owners or master, or by such circumstances as work a suspension of the contract for a particular period.<sup>d</sup> In this case of the payment of freight, as in other mercantile contracts, a month is to be understood of a *calendar* not a *lunar* month.<sup>e</sup> The time and manner of payment of freight are frequently regulated by express stipulations in a charter-party, and, when that is done, the payment must be according to the agreement. If there be no express stipulation, and the right of lien has not been waived, we have already seen that the master is not bound to part with the goods, until his freight is paid; and if by the regulations of the revenue the goods are to be landed and put into the Queen's warehouse, if the duties are not paid, the master may enter them in his own name, and thereby preserve his lien. And as he has this power to enforce the payment, so it very often becomes a *moral* duty to exercise it; for where goods are consigned by one merchant to another, it might often be highly prejudicial to the consignor to be

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When contract divisible.

In time voyage.

Lien on cargo.

<sup>a</sup> Westland v. Robinson, cited 2 Vern. 212.

<sup>b</sup> Lady James v. E. I. Co. cor. Kenyon Ch. J. at Guildhall, Sit. p. Mich. T. 1789; Roccus, Not. 75.

<sup>c</sup> Ritchie v. Atkinson, 10 East, 295.

<sup>d</sup> Beale v. Thompson, 3 B. & P. 405; Havelock v. Geddes, 10 East, 555; Ripley v. Scaife, 5 B. & C. 167; Moorson v. Greaves, 2 Camp. 627; Code de Commerce, art. 275.

<sup>e</sup> Jolly v. Young, 1 Esp. N. P. 186.

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When freight is made payable before delivery.

Shipper or consignee liable, when.

When part has been sacrificed.

called upon at the ship's return to pay the freight, which he had reason to expect the master would obtain from the consignee. I say *moral* duty, for where by the bill of lading the delivery is to be on *payment of freight*, or the like, the law does not make it compulsory on him to withhold the goods from the consignee until the freight be paid.<sup>a</sup> The payment of the freight may, indeed, be made payable *before* the delivery of the goods, by bills, or cash, or both; but, if there be nothing to show that the delivery is to *precede* the payment, the right of lien is not, in general, affected.<sup>b</sup> If entitled to cash, and the master take bills, voluntarily and for his own accommodation, he must abide the hazard of such security.<sup>c</sup> Should the master, in the exercise of his discretion, deliver without payment, he may still revert to the shipper for the freight; for *he* is liable on the charter-party, if there be one, or on the contract implied by law: besides, the consignee or indorsee of the bill of lading may be sued for the freight, if the circumstances, over and above the mere receipt of the goods (which, *per se*, is not sufficient), be such as to satisfy a jury that he has agreed to pay the freight: <sup>d</sup> and he may be sued on this new contract, it is conceived, whether there be a charter-party under seal or not.<sup>e</sup> In some cases freight is to be paid, or rather an equivalent recompense made to the owners, although the goods have not been delivered at the place of destination, and the contract for the conveyance be not strictly performed.<sup>f</sup> Thus, if part of the cargo be thrown overboard for the necessary preservation of the ship and the remainder of the goods, and the ship afterwards reach the place of destination, the value of this part is to be answered to the merchant by way of general average, and the value of the freight thereof allowed to the owner in the manner that will be explained hereafter.<sup>g</sup> So if the master be compelled by necessity to sell a part of the cargo for victuals or repairs,<sup>h</sup> the owners must pay to the merchant the price which the goods would have fetched at the place of destination, and therefore are allowed to charge the merchant with the money that would have been due if they had been conveyed thither. The French Ord.<sup>i</sup> (1681) also directs the payment of freight in another instance, which I do not find provided for in any other ordinance, or mentioned by any author except with reference to this particular article of the French Ordinance, which is as follows:—"If it happen that commerce be prohibited with the country to which a ship is in the course of sailing (*en route*), and

<sup>a</sup> Shepard v. De Bernales, 13 East, 570; Domett v. Beckford, 5 B. & Ad. 521.

<sup>b</sup> Saville v. Campion, 2 B. & A. 503; Tate v. Meek, 8 Taunt. 280; Campion v. Colvin, 3 Bing. N. C. 25, and cases *infra*.

<sup>c</sup> Tapley v. Martens, 8 T. R. 451; Marsh v. Pedder, 4 Camp. 257; Strong v. Hart, 6 B. & C. 160; Anderson v. Hillies, 12 C. B. 499.

<sup>d</sup> Domett v. Beckford, 5 B. & Ad. 524; Sanders v. Vanzeller, 4 Q. B. 260; Kemp v. Clark, 12 Ib. 647. As to

pleadings, see *Ib.* and Amos v. Temperley, 8 M. & W. 805.

<sup>e</sup> See Moorsom v. Kymer, 2 M. & S. 309.

<sup>f</sup> See Mitchell v. Darthez, 2 Bing. N. C. 555.

<sup>g</sup> Roccus, Not. 89; French Ord. liv. 3, tit. 3, Fret. art. 13; *Code de Commerce*, art. 301.

<sup>h</sup> French Ord. liv. 3, tit. 3, Fret. art. 14; *Code de Commerce*, art. 298.

<sup>i</sup> *Ib.*; and see *Code de Commerce*, art. 299.

ship be obliged to return with its lading, there shall be due only freight outward, although the ship be hired out and home." The commentators<sup>a</sup> on this article agree that the freight outward is to be paid, if the ship be freighted outward only. If, in a time of war, a neutral vessel, carrying goods belonging to the subjects of one of the belligerent powers, be taken by those of the other (in which case the goods are lawful prize, but the ship is to be restored), the captor pays the whole freight,<sup>b</sup> because he represents the enemy, by seizing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, as the captor, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. This, however, is to be understood of such goods only as a neutral vessel may convey by the law of nations, and of a trade ordinarily allowed to the neutral nation by the belligerent, to whose subjects the goods belong. If the goods are contraband according to the law of nations,<sup>c</sup> such as naval stores, &c., no freight is to be paid by the captor; nor is any freight to be paid to him if the ship is employed in<sup>d</sup> bringing the produce of the colony of a belligerent power to the mother country, or<sup>e</sup> in the coasting trade between one port and another of the same country, or<sup>f</sup> in carrying the goods, even of neutrals, directly from the mother country to its colony, or<sup>g</sup> from one hostile nation to the colony of another hostile nation in alliance with it, if these trades were not, in time of peace, open to the neutral nation, whose ship is so employed; because, in all these cases, it is evident, that the trade is opened in the time of war merely for the convenience of the belligerent power, and to relieve that power from a part of the difficulties occasioned by the war; and the neutral vessel so employed thereby furnishes direct assistance to the belligerent power. But as trade from a port of one nation to a port of another is in general open to all countries,<sup>h</sup> freight is to be paid to the owners of a neutral ship employed in carrying the goods of an enemy from a port of one nation hostile to the captors, to a port of another nation equally hostile. If, however, a ship be taken and retaken, and carried by the recaptors to a port short of the place of destination, and the ship be there stored, before the cargo is restored, either by reason of a delay on the part of the merchant to claim the cargo, or of doubt or litigation upon his right to restitution, the Court of Admiralty<sup>i</sup> does not require the ship to wait the doubtful event of the claim of the cargo, in order to convey it to the place of destination, but gives the owners their whole freight, subject only to the deduction of salvage upon the amount of it. And this with great justice; for the capture is not

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In case of capture.

Recapture.

<sup>a</sup> Valin, T. 1, p. 657; Pothier, Ch. artie, n. 69.

<sup>b</sup> The Copenhagen, 1 Rob. A. R. 33.

<sup>c</sup> The Mercurius, 1b. 288.

<sup>d</sup> The Rebecca, 2 Rob. A. R. 101.

<sup>e</sup> also the America, 3 1b. 36.

<sup>f</sup> The Emanuel, 1b. vol. 1, p. 296,

and the Mercurius there cited.

<sup>g</sup> The Emanuel, 2 1b. 186, and the Anne, 3 1b. 91, note a, and the Nancy, 1b. 82.

<sup>h</sup> The Rose, 2 1b. 206.

<sup>i</sup> The Wilhelmina, 1b. 101.

<sup>j</sup> The Race-horse, 3 Rob. A. R. 101.

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Where goods are so deteriorated as to be worthless.

Merchant's right to abandon for the freight alone.

imputable to the master; the delay of obtaining restitution of the cargo is imputable to the merchant. As it may frequently happen that goods brought in specie to the place of destination, may be so deteriorated during the course of the voyage, as to be of no value to the merchant, it is important to consider whether the merchant is bound to pay the freight under such circumstances; or, to state the question more correctly, whether he is bound to receive the goods, or is at liberty to abandon them for the freight. For we have already seen, in the case of an E. I. ship,<sup>a</sup> that the Co. (the merchants) were held liable to pay the freight of a quantity of pepper delivered to, and received by them, although greatly damaged by a peril of the sea; and that the owners were not answerable for the expense incurred in endeavouring to remove the injury occasioned by the salt water. And, in another case, that will be mentioned hereafter,<sup>b</sup> the merchant was held liable to pay the freight of tobacco saved from shipwreck, and accepted by him, although part was so much damaged as to be of no value. Upon this question as to the right of the merchant to abandon his goods when brought to the place of destination, and by so doing to discharge himself from the freight, different doctrines and opinions have prevailed, and there is no judicial decision in our books. But it is necessary to distinguish the causes from which the deterioration may have proceeded. If it have proceeded from the fault of the master or mariners, the merchant is entitled to receive a compensation, and of course he is not answerable for the freight, except by way of deduction from the amount of the compensation. On the other hand, if it have proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of ship, the merchant must bear the loss, and pay the freight; for the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. And to this point there is a direct authority in the treatise called the "Guidon."<sup>c</sup> The author, having mentioned several cases of abandonment, as between the merchant and the insurer, goes on thus:—"In like manner, the merchant cannot abandon the goods herein before-mentioned (viz., fruits, salt, corn, victuals, &c.) to the master of the ship for his freight, if the deterioration has proceeded from natural decay; or from the great diminution of price, that takes place at the end of particular seasons, as in figs, grapes, and herrings, after Easter; or by reason of an over-abundant supply of the market, as in corn, wine, or salt; although in salt a different practice formerly prevailed, which is contrary to reason, if the option has not been reserved by an express clause in the charter-party." In the very next article, however, of the treatise, we find this doctrine:—"If goods contained in casks, as wine, oil, olives, molasses, and others of the like sort, have leaked to such an extent, that the casks are empty, or nearly empty, the merchant may abandon them for the freight, before they are landed.

<sup>a</sup> Hotham v. E. I. Co. Dougl. 259.

<sup>b</sup> Lutwidge v. Grey, cited in 2 Burr.

885.

<sup>c</sup> Ch. 7, art. 10; see *Code de Commerce*, art. 305, 310.

Therefore masters should take care when they receive casks, to see CH. XVI. that they be well hooped and in good condition. It is true, that if by tempest the casks have been so pressed that they have thrown out their bottoms, have been beaten in, and burst, provided there have been no fault in the stowage, the loss shall be an average against the insurers, the master shall lose his freight."

From the words of this article it appears very clearly that, in the opinion of the author, the merchant might abandon articles of this description, although the leakage were not occasioned by peril of the sea. In the work of Molloy,<sup>a</sup> however, we find the following clause:—"If freight be taken for 100 tuns of wine, and twenty of them leak out, so that there is not above eight inches from the bung upwards, yet the freight becomes due. One reason is, because from that gage the King becomes entitled to custom; but if they be under eight inches, by some it is conceived to be then in the election of the freighters to fling them up to the master for freight, and the merchant is discharged. But most conceive otherwise; for if all had leaked out (if there was no fault in the master), there is no reason the ship should lose her freight, for the freight arises from the tonnage taken; and if the leakage was occasioned through storm, the same, perhaps, may come into an average. Besides, in Bourdeaux<sup>b</sup> the master stows not the goods, but the particular officers appointed for that purpose, *quod nota*. Perhaps a special convention may alter the case." The French Ordinance<sup>c</sup> (1681) declares, "That the merchant shall not oblige the master to take for his freight goods diminished in price, spoiled, or deteriorated by their own vice, or by peril of the sea." And the very next article is as follows:—"If goods put into casks, as wine, oil, honey, and other liquors, have leaked out to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight." Valin, in his commentary on this last article, observes that it is taken from the article of the "Guidon," which I have just before quoted. He informs us, moreover, that by the collection of laws, called the "Consolato del Mare," chap. 202, the contrary is decided; yet that, by another article in the same collection, ch. 234, freight is not due for pottery, unless it be found entire at the end of the voyage; and he considers this article of the Ordinance to give the right of abandonment to the merchant, in the case of leakage happening as well from the fault of the casks as from the perils of the sea, and to be an exception to the general rule laid down in the article immediately preceding. On the other hand, his countryman, Pothier,<sup>d</sup> controverts this opinion, and contends that the article of the Ordinance is to be confined to the case of leakage occasioned by peril of the sea; in which case he considers the real commodity, viz., the contents of the casks, to be absolutely lost, as much as if they had been washed overboard. "This opinion of M. Valin" (says he) "appears to me to be contrary to principles. It is the fault of the

<sup>a</sup> B. 2, c. 4, s. 14. The author cites Boyce v. Cole, Hil. Ter. 26 & 27 Car. 2 in K. B. But I do not find that case reported elsewhere.

<sup>b</sup> See Cleirac on the 11th art. of the

laws of Oleron.

<sup>c</sup> French Ordinance, liv. 3, tit. 3, Fret. art. 25 and 26; *Code de Commerce*, art. 305.

<sup>d</sup> *Traité de Charte-partie*, num. 60.



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merchant if he has put his goods into bad casks. It is *his* fault if they have leaked out, and have not arrived at the place of destination; he therefore ought to pay their freight; for according to the principles of the contract of hiring, the hirer, who by his own act or fault has not enjoyed the thing let to him, ought to pay the hire as if he had enjoyed it. If the letter, who has been prevented from letting to other persons the part of his vessel occupied by the bad casks, should not be paid the freight, he would suffer for the fault of the hirer, which is unjust." This argument of Pothier may show what ought to have been established by the Ordinance, but it by no means proves that the interpretation given by Valin, and which agrees with the terms of the "Guidon," is not the true interpretation. The rule was probably introduced in early times, to prevent disputes and litigation, and adopted by the framers of the French Ordinance (of 1681) for the same reason.<sup>a</sup> In our W. I. trade, the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which in fact is, in every instance, less than the weight at the time of the shipment; and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship by the nature of the contract. Upon the propriety, also, of the rule laid down in the preceding article of this Ordinance, namely, that which prohibits abandonment generally, these two learned foreigners have differed in opinion. "It must be agreed" (says Valin) "that this rule is too rigorous to be compatible with equity. The natural idea that the mind forms of the agreement for freight is, that it has for its object that the goods shipped in pursuance of it shall be the only pledge for the freight, and consequently that upon the same goods alone can the payment of the freight be enforced. From whence it follows that, in every case (*en quelque cas que ce soit*) the merchant ought to be quit of the freight by abandoning his goods. This is also the opinion of Casa Regis Disc. 22, n. 46, and Disc. 23, n. 86 and 87. In the case of shipwreck it is decided by the Ordinance that the freight is not due when the goods are lost. Now, when the goods are so injured by the shipwreck that he to whom they belong cannot derive from them wherewith to pay the freight, is it not the same to him as if they had been wholly lost by the mere act of shipwreck? If, then, he had not the power of abandoning the goods, to discharge himself from the payment of the freight, his condition would be worse than if all had perished without resource; and this is what natural equity will not allow him to suffer." The learned commentator then proceeds to acquaint us that a practice prevailed in his country of not compelling the merchant to reclaim shipwrecked goods, and that, unless he reclaimed them, the master was never known to obtain the payment of the freight. On the other hand, Pothier,<sup>b</sup> speaking of this article of the Ordinance of his country, says, "This

<sup>a</sup> The Ord. of Rotterdam on this subject seems to agree with the general rule of the French Ord. It declares that when the goods are arrived at the intended place, the merchant is obliged to pay the freight of what happens to be

damaged or diminished without any fault of the master or ship's crew. Art. 155, 2 Magens, 105; and see *Code de Commerce*, art. 305, §10.

<sup>b</sup> *Charte-partie*, n. 59.

rule, notwithstanding what is said of it by M. Valin, is just and conformable to the principles of the contract of letting to hire. It is sufficient, according to these principles, to make the whole hire due to the letter, that he has wholly performed the obligation which he contracted, to give to the hirer the enjoyment of the thing let to hire. Now, the master, having transported the goods to their place of destination, it may be truly said that he has wholly fulfilled his obligation, and that he has given to the merchant the enjoyment of the ship for the use for which he had let it to him, since this transport was the only use for which they contracted. If the goods are found greatly damaged and of no value, this is a matter that does not concern the master, because it is by an accident, against which he does not warrant, that they are reduced to this condition. The point of M. Valin's objection (proceeds he) is, that it is the same thing to the merchant whether the goods are absolutely lost, or become of no value. The answer is, that it is on the side of the master that we ought to consider whether this is the same thing. Now, it is evident that this is not the same thing to the master. For when the goods are lost on the way, not having been able to transport them to the place of destination, he has not fulfilled the object of his contract, *munere vehendi functus non est*; and it is for this reason that the freight is not due to him: but when he has transported them, however injured they may be found, he has fulfilled the object of his contract, *munere vehendi functus est*, and, by consequence, the freight is due to him." In addition to this answer given by Pothier, it may be proper also to observe that the argument of Valin seems to prove too much; for if the goods are to be the only security for the freight, and the merchant ought not to pay the freight if they are not worth the amount of it, the master and owners must lose the freight, if the goods happen from any accident to come to a bad market; which is contrary to all law and reason: and further, that the foundation of the argument does not apply to this country, by the law of which, although the goods are pledged for the freight, yet the merchant also is personally responsible for it. I have detailed the opinions of these learned foreigners thus at length, because they appear to me to comprise the whole argument on both sides of the question, which, as I have before observed, has not received a judicial decision in this country. It is true, indeed, that Ld. Mansfield, in a case that will be more fully stated hereafter, delivered himself to the following effect: "As to the value of the goods, it is nothing to the master whether the goods are spoiled or not, provided the merchant takes them; it is enough that the master has carried them; for by doing so, he has earned his freight, and the merchant shall be obliged to take all that are saved, or none; he shall not take some, and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight, and he may abandon all, though they are not all lost." But it is to be observed that the question of abandonment was not the point in issue in that cause; and, in fact, in that cause the goods had not been carried to the place of destination, but the vessel, which was bound for Lisbon, had been captured

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and recaptured, and was carried, with the goods, into a port in Devonshire, where the merchant received them: and therefore, if *Ld. Mansfield* is to be understood to speak with reference to the case then before him, the sentiments delivered by him on that occasion cannot be considered as furnishing an authority for the decision of the question in the case of goods actually carried to the place of destination. It is true, also, that in the case of *Lutwidge v. Grey*, which will be fully cited for another purpose in the subsequent part of this chapter, it seems to have been taken for granted by the counsel on both sides, that the merchants might have abandoned the whole cargo; but in that case the ship was wrecked, and the goods saved at a great expense, at a place short of the port of delivery; and the right of abandonment is spoken of with reference to the situation of the goods at that place. Most certainly the merchant cannot be compelled to accept his goods at any other place than the place of destination. Even if the master should pay the salvage, and convey them to that place, the merchant may be allowed to have his option of accepting them or not, loaded with the additional expense of salvage. And accordingly, in another case,<sup>a</sup> *Ld. Mansfield* said, "The owner of the ship has a lien for freight, but in a total loss, literally so called, no freight is due; in case of a loss, total in its nature, with salvage, the merchant may either take the part saved, or abandon." The only point intended to be proposed by me as doubtful, is the right to abandon for the freight alone at the port of destination; and in point of practice I have been informed that this right is never claimed in this country.

Apportion-  
ment of  
freight.

Having thus considered the cases in which the entire freight is to be paid according to the agreement, I now proceed to the consideration of those in which a part only of the stipulated sum may be claimed. And these are, 1st, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination. And, 2ndly, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant, at a place short of the port of destination. In the case of a general ship, or of a ship chartered for freight, to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered:<sup>b</sup> the contract in these cases being distinct, or at least divisible in its own nature. But suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract, as observed by *Ld. Ch. Hardwicke*,<sup>c</sup> is more properly a contract for the use of the ship, than for the conveyance of the merchandise), should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination; in this case, I do not find any authority for apportioning the freight. And it seems to have been the opinion of *Malyne*,<sup>d</sup> that nothing would be due, and the case of *Bright v. Cowper*, which will be mentioned hereafter,<sup>e</sup> may be considered as an authority in support of that

<sup>a</sup> *Baillie v. Moudigliani*, cited in 4 T. R. 785.

<sup>b</sup> *Christy v. Row*, 1 Taunt. 300; *Ritchie v. Atkinson*, 10 East, 295.

<sup>c</sup> In the case of *Paul v. Birch*, 2 Atk. 621.

<sup>d</sup> *Malyne's Lex. Merc.* p. 100.

<sup>e</sup> 1764, 220.

pinion. But, probably, if the question should arise again, the determination of it would depend upon the particular words of the charter-party; for without a very precise agreement for that purpose, it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them.<sup>a</sup> The apportionment of freight usually happens when the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case, we have already seen, that the master *may*, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight;<sup>b</sup> but if he is unable, or if he declines to do this, and the goods are there voluntarily accepted by the merchant, in such a way as to raise a fair inference that the further carriage of them is intentionally dispensed with, a claim for *pro rata* freight arises.<sup>c</sup> Some writers<sup>d</sup> have endeavoured to trace this rule to the Digest of Justinian, but the passages referred to by them do not appear to contain such a regulation. The rule, however, is without doubt extremely ancient. It is to be found in the collection of laws<sup>e</sup> called the Rhodian Laws, but which collection<sup>f</sup> is now generally agreed to be of a later date than the time of Justinian; and also<sup>g</sup> in the "Consolato del Mare." The rule, as laid down in the laws of Oleron,<sup>h</sup> is to the following effect:—If a ship depart with a cargo from B., or other place, and it happens that the ship is disabled, and as much of the cargo is saved as possible, the merchants and master enter into a great debate, and the merchants demand to have their goods of the master, they may have them, upon paying of freight for so much of the voyage as the ship has advanced, rateably and in proportion, if the master pleases; but if the master will, he may repair his ship, if he can do it speedily, and if not, he may hire another ship to complete the voyage, and shall have his freight of the goods, to be reckoned according to their proportion of the whole cargo: and the goods shall pay the costs of their salvage. The rule is also to be found in Roccus,<sup>i</sup> who cites several more ancient authors in support of it, and in all the subsequent writers on maritime law; and is adopted in most of the foreign ordinances, particularly in the French Ord. (1681),<sup>k</sup> which declares, that "The master shall be paid the freight of goods saved from shipwreck, if he conveys them to the place of destination. If he cannot find a vessel to convey the goods

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<sup>a</sup> See *Sinclair v. Bowles*, 9 B. & C. 92; *Roberts v. Havelock*, 3 B. & Ad. 406.

<sup>b</sup> *Mitchell v. Darthez*, 2 Bing. N. C. 555; *Shipton v. Thornton*, 9 A. & E. 334; *ante*, pp. 82, 191.

<sup>c</sup> *Vlierboom v. Chapman*, 13 M. & W. 238; *Hunter v. Prinsep*, 10 East, 394.

<sup>d</sup> Roccus, Not. 81.

<sup>e</sup> Per Ld. Mansfield in *Luke v. Lyde*, 2 Burr. 889.

<sup>f</sup> Schomberg's dissertation on these

laws. The only rule that can be distinctly and authoritatively traced to the institutions of Rhodes is the law "de Jactu," quoted and adopted in the Dig. 14, 2, 1.

<sup>g</sup> Per Ld. Mansfield in *Luke v. Lyde*, 2 Burr. 889.

<sup>h</sup> Art. 4, and see Ord. of Wisbuy, art. 16, 37.

<sup>i</sup> Loc. sup. cit.

<sup>k</sup> Liv. 3, tit. 3, Fret. art. 11, 21, 22; also *Code de Commerce*, art. 302, 303.

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saved, he shall be paid freight in proportion only to the voyage performed."

*With regard to capture and ransom*, the author of the "*Guidon*,"<sup>a</sup> speaking of the case where the goods only are taken by pirates and the ship discharged, and the goods are afterwards ransomed, says, that "If the master will not contribute to the ransom, he shall lose his whole freight; but, if he contributes, he shall be paid freight as far as the place of the capture, as well in the case of affreightment by charter-party as otherwise: and if he furnishes another ship to relade the goods, he shall be paid his whole freight." Upon this subject, the French Ord. (1681)<sup>b</sup> provides, "that if the ship and goods are ransomed, the master shall be paid his freight as far as the place of capture, even his whole freight, if he conveys the goods to the place of destination, he contributing to the ransom." Although ransom is now prohibited by the law of England, yet this doctrine may apply to the case of capture and recapture; and, accordingly, in an action brought by a seaman for his wages, in the case of a ship taken and retaken, and which reached the port of destination,<sup>c</sup> *Ld. Eldon*, before whom the cause was tried, held that the wages were payable, because, said his lordship, "the ship on her arrival was entitled to freight." Upon this subject of the apportionment of freight, *Malyne*<sup>d</sup> says, "If the ship in her voyage become unable, without the master's fault, or that the master or ship be arrested by some authority of magistrates in her way, the master may either mend his ship or freight another. But in case the merchant agree not thereunto, then the master shall at least recover his freight, so far as he hath deserved it." The same author also mentions the following case:—A merchant took a ship to freight, and put in the master and mariners, and victualled the ship at his own expense, and by a charter-party engaged to pay the owner for the use of the ship and furniture 20*l.* every month at her return into the river Thames. The merchant laded the ship for the Straits, and to go from port to port and to several places with merchandise; and after about two years, the ship, having taken in a cargo at Barbary, was, on her return to London, cast away by tempest near Dover; and the goods were saved: the merchant refused to pay the freight, because the ship did not arrive in the river Thames, according to the words of the charter-party:—"Herein" (says the author) "the owner was much wronged, for the money is due monthly, and the place was named only to signify the time when the money was due to be paid;" but he does not inform us whether the question was ever brought before a court of justice, or whether or no the merchant finally paid any part of the freight. His opinion, however, has since been confirmed.<sup>e</sup>

In *Luke v. Lyde*,<sup>f</sup> *Ld. Mansfield* said, "If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master,

<sup>a</sup> Ch. 6. art. 7.

<sup>b</sup> Liv. 3, tit. 3, Fret. art. 19; *Code de Commerce*, art. 303, 304.

<sup>c</sup> *Bergstrom v. Mills*, 3 Esp. N. P. 36.

<sup>d</sup> *Malyne*, p. 98.

<sup>e</sup> *Ib.* p. 101.

<sup>f</sup> *Havelock v. Geddes*, 10 East, 555.

<sup>g</sup> 2 Burr. 882.

the master has his option of two things : either to refit it, if that can be done within convenient time, or to hire another ship, to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage ; and so it was determined in the House of Lords in the case of *Lutwidge v. Grey*. As to the value of the goods, it is nothing to the master of the ship whether the goods are spoiled or not, provided the freighter takes them : it is enough if the master has carried them ; for by doing so, he has earned his freight ; and the merchant shall be obliged to take all that are saved, or none ; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight : and he may abandon all, though they are not all lost. (I call the freighter the merchant, and the other the master, for the clearer distinction.) Now here is a capture without any fault of the master, and then a recapture ; the merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it ; and he would not desire to find another, because the freight was higher from Biddeford to Lisbon, than from Newfoundland to Lisbon. There can be no doubt but that some freight is due ; for the goods were not abandoned by the freighter, but received by him of the recaptor. The question will be—what freight ? The answer is, a rateable freight ;—i. e., *pro ratâ itineris*. If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro ratâ*, of the former part of the voyage. I take the proportion of the salvage here to be half of the whole cargo upon the state of the case, as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as lost. For the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce, and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half of the goods must be considered as lost, and half as saved. Here the master had come 17 days of his voyage, and was within 4 days of the destined port when the accident happened. Therefore he ought to be paid his freight for  $\frac{17}{21}$  parts of the full voyage, for that half of the cargo which was saved . . .” It is quite immaterial what the merchant made of the goods afterwards, for the master hath nothing at all to do with the goodness or badness of the market ; nor, indeed, can that be properly known, till after the freight is paid ; for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge* and *How* against *Grey* in the House of Lords ; and yet there the tobacco was damaged very greatly, even so much that a great part of it was burnt at the scales at Glas-

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gow.<sup>a</sup> In *Baillie v. Moudigliani*,<sup>b</sup> a ship sailed with goods from Nevis for Bristol, but on the voyage was taken and carried into France, and condemned there. On appeal, the sentence of condemnation was reversed, and restitution awarded; but, before that time, the ship and cargo were sold. The merchants received the price of the goods, and paid freight to the master *pro ratâ itineris*; and, having caused the goods to be insured before the commencement of the voyage, brought an action against the insurers to recover from them the freight so paid to the master. The Court held that this payment could not be recovered upon this insurance. But *Ld. Mansfield* said, "As between the owners of the ship and cargo, in case of a total loss, no freight is due, but as between them no loss is total, where part of the property is saved, and the merchant takes it to his own use. In this case, the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro ratâ itineris*. So where a ship under a neutral flag, and with neutral papers, was in time of war driven into a British port by stress of weather, and seized together with the cargo, and libelled in the Court of Admiralty for condemnation, on account of various circumstances, which led to a suspicion that both ship and cargo were the real property of the enemy, and the neutrality of the cargo being proved before proof of the neutrality of the ship arrived,<sup>c</sup> the cargo was restored during the detention of the ship, and part thereof was sent in other vessels to the place of destination, and the residue conveyed to London. The Court of Admiralty, after having decreed the restoration of the ship, decreed also that the merchants should pay freight for their goods for the portion of the voyage performed.<sup>d</sup> The case of *Bright v. Cowper*,<sup>e</sup> cited by *Mr. J. Grose*, in *Cook v. Jennings*, happened in the time of *James the First*, at a period when mercantile causes or contracts had very seldom occupied the attention of the English courts of justice. The report of it is in the following words:—"Action of covenant brought upon a covenant made by the merchant with the master of a ship, viz., that if he would bring his freight to such a port, then he would pay him such a sum, and shows that part of the goods were taken away by pirates, and that the residue of the goods were brought to the place appointed, and there unladed, and that the merchant hath not paid, and so the covenant broken; and the question was, whether the merchant should pay the money agreed for, since all the merchandises were not brought to the place appointed; and the Court was of opinion that he ought not to pay the money, because the agreement was not by him performed." Upon reading this report, it is not quite clear what was the real question before the Court; but it seems that the plaintiff claimed his whole freight, to which it

<sup>a</sup> As to form of declaration in *Luke v. Lyde*, see *Cook v. Jennings*, 7 T. R. 381; *Sanders v. Vanzeller*, 4 Q. B. 260. Partial loss of freight may be recovered in a declaration for a total loss, *Benson v. Chapman*, 2 H. of L. Cases, 696.

<sup>b</sup> *Ante*, p. 216.

<sup>c</sup> *The Copenhagen*, 1 Rob. Adm. Rep. 289.

<sup>d</sup> And see *Cook v. Jennings*, 7 T. R. 381.

<sup>e</sup> 1 Brownl. 21.

might very properly be decided that he was not entitled, as he had not performed the whole contract; if he claimed a part only of the freight, and was held by the Court not to be entitled to anything,—it may be, that by the particular terms of the contract, the payment of freight was made to depend upon the delivery of the entire cargo. Molloy,<sup>a</sup> immediately after the citation of this case, adds the following observation:—"But, by the civil law, this is *vis major*, or *casus fortuitus*, there being no default in the master or his mariners, and the same is a danger or peril of the sea, which, if not in naval agreements expressed, yet is naturally implied: for most certain, had those goods, which the pirates carried away, in stress of weather *navis levanda causâ* been thrown overboard, the same would not have made a disability as to the receipt of the sum agreed on; for by both the common law and the law marine, the act of God, or that of an enemy, shall noways work a wrong in actions private."

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But as the right to freight does not commence until the ship has broken ground, and begun the voyage, no partial payment can be claimed for goods laden on board, if even without the fault of the master the ship is prevented from actually setting forth on the voyage.<sup>b</sup> It often happens that a ship is hired by a charter-party to sail from one port to another, and from thence back to the first; as, for instance, from London to Leghorn, and back from thence to London, at a certain sum to be paid for every month or other period of the duration of the employment. Upon such a contract, if the whole is one entire voyage, and the ship sail in safety to Leghorn, and there deliver the goods of the merchant, and take others on board to be brought to London, but happens to be lost in her return thither,<sup>c</sup> nothing is due for freight, although the merchant has had the benefit of the voyage to Leghorn; but if the outward and homeward voyage are distinct,<sup>d</sup> freight will be due for the proportion of the time employed in the outward voyage. Upon this point Malynes<sup>e</sup> mentions a remarkable case of five ships in which he himself was interested, as one of the merchant freighters. The whole five were freighted out from this country for Leghorn and Civita Vecchia, and back from those places. They all performed their outward voyage, but before any part of the homeward cargo was shipped, they all set sail and came away, through fear of being taken by the galleys of Don Andrea Doria, who intended to surprise them, the Grand Armada being then preparing in Spain. Two of the ships had waited for their lading the whole time stipulated by their charter-parties, and the masters had made their protests against the factors who should have laded them. These two, says the author, were by the law of the Admiralty adjudged to have deserved their whole freight. Two others, not having waited the stipulated time, could not be found to have deserved any freight at all, although they were laden outward. The fifth ship, also, had not waited the stipulated time, but her charter-party contained a proviso, that if she should be taken or

When right to freight commences.

<sup>a</sup> Molloy, b. 2, ch. 4, s. 7.

<sup>b</sup> Curling v. Long, 1 B. & P. 634.

<sup>c</sup> This proposition is laid down by Molloy, b. 2, ch. 4, s. 9, and he cites in support of it the before-mentioned case

of Bright v. Cowper, with a reference to Brownlow, in whose report the point does not appear.

<sup>d</sup> Crozier v. Smith, 1 Sc. N. R. 346; 9 P. 98.



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cast away on her return out of the Straits, the freight outwards, which was accounted half, should be paid ; and that half and no more was adjudged to the master. It should seem that this proviso, in the case of the fifth ship, occasioned the outward and homeward voyages to be considered as distinct voyages, for the event mentioned in the proviso had not happened. And a similar construction was given to a very different charter-party, in the following case.\* Mackrell, the owner of a ship called the *Richard*, lying in the river Thames, let his ship to freight by a charter-party, dated 9th March, 1774, to Simond and another "by the month, for such time as she should be employed in performing a voyage from London to Plymouth and the island of Grenada, and from thence back to London," and whereby the plaintiff covenanted, "that the ship should, pursuant to the orders and directions of the freighters, their factors or assigns, prosecute and perform the voyage above mentioned (the dangers and perils of the sea and the restraint of princes and rulers excepted), and should in such outward and homeward voyage load and unload all lawful goods ; and that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes, as customary at the island of Grenada, and that he would pay all port charges and pilotage. In consideration whereof, the defendants covenanted that they "would load and unload the ship, and give the master proper orders in respect thereof ; and that the ship should be discharged out of her said monthly employ on the delivery of her homeward cargo in London ; and also should and would well and truly pay or cause to be paid to the said owner, his executors, administrators, or assigns, in full for the freight and hire of the said ship, at the rate of 110*l.* sterling per calendar month, for all such time as the said ship should be taken up in performing the voyage aforesaid, to commence and be accounted from the day of the date of the said charter-party, and to end and determine on the day of the discharge of the homeward cargo at London, and to be paid one-third part thereof on her report inwards at the Custom-house, London, and the remaining two-third parts thereof in two calendar months then next following." In pursuance of this charter-party, the ship took in goods belonging to the merchants Simond and Hankey, at London, sailed with them to Plymouth, and there took in other goods also belonging to them, and from thence proceeded to Grenada, and there landed the cargo ; and received another cargo from the merchants' factor there, with which she set sail for London ; but on the way was lost by tempest. The voyage to Grenada occupied three months, and five months elapsed in the whole before the loss of the ship. After the misfortune, the owner brought an action against the merchants, claiming of them the payment of freight either for three or for five months. The merchants insisted that nothing was due. The Court decided that freight was payable for three months, the period of the outward voyage ;

\* *Mackrell v. Simond and Hankey*, in K. B. Trin. T. 16 Geo. 3. It was an action of covenant on the charter-party, in the first count of which the plaintiff claimed freight for the period of the voyage to Grenada ; in the second

up to the day of the loss of the ship. The defendants demurred to both counts. Judgment was given for the plaintiff on the first count, and for the defendants on the second.

and *Ld. Mansfield* delivered his judgment to the following effect: CH. XVI.

“ This question depends upon the construction of the charter-party. If the parties have expressed their meaning defectively, the Court must be guided by the nature of the thing. The charter-party puts no case but that of a prosperous voyage out and home ; it provides for freight on the supposition that the ship will arrive safe, and report her cargo ; no provision is made for any other case. If the ship be cast away on the coast of England, and never arrive at the port of London, yet, if the goods are saved, freight shall be paid, because the merchant receives advantage from the voyage. This is not expressed by the charter-party, but arises out of the equity of the case. Freight is the mother of wages ; the safety of the ship the mother of freight : that is the general rule of the maritime law. If there be one entire voyage out and in, and the ship be cast away in the homeward voyage, no freight is due, no wages are due, because the whole profit is lost ; and by express agreement the parties may make the outward and homeward voyage one. Nothing is more common than two voyages. Wherever there are two voyages, and one is performed, and the ship is lost in the homeward voyage, freight is due for the first. Here the outward and homeward voyage are so called in the charter-party. The cargo is loaded outwards, and the owner covenants to pay port charges on the outward voyage. The whole of that voyage was completed ; port duties are incurred and paid. Nothing, however, is due on the homeward voyage, though the ship might be out a month.” In the following case,<sup>a</sup> the words of the charter-party being different, a different construction prevailed. One *Pattinson*, master and part-owner of the ship *William and Mary*, lying at Liverpool, by a charter-party dated 28th July, 1794, let the ship to freight to *Byrne* and others for a voyage intended to be made from Liverpool to the island of Madeira, and from thence to the island of Barbadoes, and from thence back to Liverpool, Greenock, or Bristol, but with liberty for the freighters to order the said vessel from Barbadoes to any one other island in the West Indies (Jamaica excepted), they paying all pilotage and port charges incurred thereby. And the said freighters accordingly by the said charter-party took and hired the same in manner following (that is to say), that the master should immediately receive and take a cargo on board the said vessel from the freighters, and the said vessel so laden should immediately proceed directly to Madeira, and deliver such goods as should be ordered by the said freighters, and also should receive and take on board the said vessel at Madeira such other goods as the said freighters might think proper to ship, and that being done, the master should proceed with the said vessel to Barbadoes, and there make delivery of her cargo, and receive and take on board a cargo from the freighters, and, being

<sup>a</sup> *Byrne v. Pattinson*, in *K. B. Trin. T. 37 Geo. 3*. The question arose on a set-off pleaded by the defendant, the master of the ship, to an action brought against him on another account by the merchant. The plea did not refer to the charter-party, but was for the freight and hire of the ship from Liverpool to Madeira, and from thence to Barbadoes,

and for the disbursements and port charges of the ship at Madeira, and on the voyage; and for work and labour generally, and money paid; so that the decision did not turn upon the form of the proceedings in the cause. The question came before the Court by a special case reserved from the assizes.

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loaden therewith, should with the first opportunity proceed directly to the port of Liverpool, Greenock, or Bristol, and there deliver the same cargo, and so end the said intended voyage. In consideration of which the said freighters thereby promised and agreed, amongst other things, to pay to the defendant in full for the freight and hire of the ship for the said voyage the sum of 136*l.* 10*s.* per calendar month, for six months certain, to commence in eight days after she was ready to receive the cargo at Liverpool, and to continue until she was discharged at Liverpool, Greenock, or Bristol, together with two-thirds the amount of all pilotage and port charges that might accrue and be paid during the course of the said voyage, with customary primage: payment thereof to be made in manner following, viz., 136*l.* 10*s.* to be advanced before sailing from Liverpool, by a good bill at three months date, and what cash might be required for the said vessel's disbursements and port charges at Madeira and Barbadoes, to be paid in part of the said freight, and the remainder of the said freight should become due and be paid on the final discharge of the said vessel at Liverpool, Greenock, or Bristol, by good bills on London at three months date. The period of computation commenced on the 7th of August, 1794; on the 19th of that month the ship sailed from Liverpool for Madeira, freighted with goods, and arrived there on the 19th of September, and discharged at that place by the 4th of October as many of the goods as were to be delivered there, and took on board, on account of the merchants, ninety pipes of wine, and sailed from thence on the 9th of October for Barbadoes, but on the 10th of Nov. was captured on the way thither. The merchants had paid 135*l.*, part of the freight for the first month, and also the port charges and disbursements for the ship at Madeira. Pattinson now claimed in the present suit further freight from the 7th of Sept. to the day of the ship's capture, or to the day when she had completed the delivery at Madeira, or freight for the goods delivered there, at the usual rate of conveyance, allowing the 135*l.* But the Court held that he had no claim whatever. On his part it was contended that there ought to be an apportionment in this case; and the passage before cited from Malyne, relating to a ship lost at Dover, was quoted as an authority in his favour. But Ld. Kenyon, C. Just., said, "In that case the goods came to the merchants' hands, and the owner of the ship might have provided another ship to carry them to London. In this case, by the terms of the contract, the freight is to become due at Liverpool, and therefore it cannot be claimed before." These two cases may serve as a guide for the construction of other charter-parties on the same subject, or for the framing of a charter-party in such a manner as to express the real meaning of the contracting parties without ambiguity.<sup>a</sup>

As before observed, a partial loss of freight may be recovered, on a declaration for a total loss.<sup>b</sup>

It is a good plea to an action for freight that it has been paid into the Admiralty Court in pursuance of a monition in a bottomry suit.<sup>c</sup>

<sup>a</sup> See also *Smith v. Wilson*, 8 East, 437; *Storer v. Gordon*, 3 M. & S. 308; *Gibbon v. Mendez*, 2 B. & A. 17; *Crosier v. Smith*, 1 Sc. N. R. 346.

<sup>b</sup> *Benson v. Chapman*, 2 H. L. Cases, 696.

<sup>c</sup> *Place v. Potts*, 8 Exch. 715.

## CHAPTER XVII.

## CH. XVII.

GENERAL OR GROSS AVERAGE.<sup>a</sup>

HAVING thus treated of the respective duties of the owner and the merchant, I now proceed to the consideration of a subject, which is equally a duty of the one and the other, namely, the general contribution that is to be made by all parties toward a loss sustained by some for the benefit of all. This contribution is sometimes called by the name of general average, to distinguish it from special or particular average, a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever; and sometimes by the name of gross average, to distinguish it from customary average, mentioned in the bill of lading, which latter species is sometimes called also petty average. The principle of this general contribution is known to be derived from the ancient laws of Rhodes, being adopted into the Digest of Justinian with an express recognition of its true origin. The wisdom and equity of the rule will do honour to the memory of the state, from whose code it has been derived, as long as maritime commerce shall endure. The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law that has been followed by more variations in practice. The modern ordinances of the several continental states of Europe differ from each other in many particulars relating to this general contribution, and the French Ordinance (of 1681) established a different mode of contribution in different cases.<sup>b</sup> An enumeration of these varieties would furnish little entertainment or instruction to an English reader: discordant rules rather serve to perplex the choice, than to guide the judgment. If any one is desirous of knowing all that doctors have written, and states ordained, on these particulars, I must refer him to the very elaborate and learned treatise of Emerigon on Insurance, a work, in which no subject is discussed without being exhausted.<sup>c</sup>

\* \* \* The work of Magens contains a variety of cases of adjustment of average, by consuls and courts abroad and by merchants at home, detailed with all the tedious formularies of the notarial office, and the minutiae of the counting-house, but accompanied by some very judicious remarks. The most useful information upon this subject is to be found in Mr. Park's "System of Marine Insurances" (which forms the first part of this work), but as the nature of the present work requires that it should also be treated of here, I shall examine, 1st, the cases in which general contribution is to be made; 2ndly, the articles that are to contribute; and, lastly, the mode of contribution; confining myself as closely as possible to the autho-

<sup>a</sup> Park on Marine Ins. ante, ch. 7.

<sup>b</sup> And see Code de Commerce, tit. Des Avaries.

<sup>c</sup> Ch. 12, ss. 39 to 42. See also on the subject of this chapter Weakett on

Ins. tit. Contribution, Cutting, General Average, and Jettison, in which are many citations from the foreign ordinances. Code de Commerce, art. 400.

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Shipping.*

In what  
cases pay-  
able.

*Jettison.*

rities and practice of our own nation, or to those ancient laws and ordinances, which are generally considered as guides by English lawyers on subjects of maritime law. The rule of the Rhodian law is this:—"If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all."<sup>a</sup> The goods must be thrown overboard; the mind and agency of man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard to lighten the ship; if they are cast overboard by the wanton caprice of the crew or the passengers, they, or the master and owners for them, must make good the loss. The goods must be thrown overboard for the sake of all; not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods; but, because at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock or a shallow upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure, that may facilitate the motion and passage of the ship, can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure may be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all.<sup>b</sup> But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss. Many of the foreign ordinances<sup>c</sup> have prescribed various forms to be adopted with respect to jettison; some of them have even named the persons to be consulted before it takes place, and have set down the phrases of consultation, and specified the sorts of goods that shall be first thrown; and some authors have amused themselves by dividing the act itself into the several species of regular and irregular, formal and informal.<sup>d</sup> But the regulations prescribed by persons at ease in the closet or the senate-house will seldom be followed at the moment when life, or liberty, is in jeopardy; at such a moment every one present will exclaim with the friend of

<sup>a</sup> Dig. 14, 2, 1. *Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est.*

<sup>b</sup> *Moussé's case*, 12 Co. 63, mentioned also in *Bird v. Astcock*, 2 Bulst. 280; *Taylor v. Curtis*, 6 Taunt. 608, and cases cited; *Butler v. Wildman*, 3 B. & A. 898, and see *Gould v. Oliver*, 4 Bing.

N. C. 143; *Milward v. Hibbert*, 2 G. & D. 147.

<sup>c</sup> *Laws of Oleron*, art. 8 & 9; *Ord. of Wisbuy*, art. 20, 21, and 38; *French Ord. of 1681*, liv. 3, tit. 8; *Du Jet*, art. 1, 2, 3, and 4, and *Valin* thereon; *Code de Commerce*, art. 410.

<sup>d</sup> See *Emerigon*, tom. 1, p. 605; *Cons. del Mare*, cap. 47, 48, and 49.

Juvenal, *Fundite quæ mea sunt—etiam pulcherrima*; and, provided CH. XVII. the jettison have been the effect of danger and the cause of safety, all writers agree that contribution ought to be made, although the forms have not been complied with. Previous deliberation, if there be time to deliberate, and a due choice of the heaviest and most cumbersome articles, may be proofs of the necessity and propriety of the act: but they are not the only, and therefore ought not to be deemed the essential proofs.<sup>a</sup> Indeed, in this case, as in many others, too close a compliance with forms at a period of supposed danger has very justly excited a suspicion of fraud.<sup>b</sup> In all cases, however, and in all countries, it is justly required of the master that he draw up an account of the jettison, and verify the same by the oath of himself and some of his crew, as soon as possible after his arrival at any port, that there may be no opportunity to purloin goods from the ship, and then pretend they were cast over in the hour of danger. From the rule thus established by the Rhodians various corollaries have been deduced. Thus, if in the act of jettison, in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if to avoid an impending danger, or to repair the damage occasioned by a storm,<sup>c</sup> the ship be compelled to take refuge in a port, to which it was not destined, and into which it cannot enter without taking out a part of the cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods for the general benefit, must be repaired by general contribution; but if, after the removal of goods for such a purpose, the ship with the remaining cargo should unfortunately perish, and the goods in the barges be saved, the proprietors of the latter shall not contribute to the loss of the others, because the safety thereof is not owing to that loss. So if part of the cargo be voluntarily and without fraud or cowardice delivered up to a pirate by way of composition or ransom, to induce him to spare the vessel and the residue of the goods (an event highly improbable); or if a sum of money be agreed to be paid to a pirate or enemy by way of ransom, all writers agree that the value of the ransomed must contribute to this loss also; but if the enemy or pirate, having overpowered the ship, select for himself such parts of the cargo as best suit his purposes, and plunder the ship of them, in this case there shall be no contribution, because the value of these goods was not the price of safety to others.<sup>d</sup>

Loss by removal.

Ransom.

<sup>a</sup> So decided in *Birkley v. Presgrave*, 1 East, 220, as to other cases of general average.

<sup>b</sup> Emerigon, tom. 1, p. 605, cites an observation of Targa, who says, that during sixty years, in which he had been a magistrate at Genoa conversant with the subject, he had known only five instances of regular jettison, all of which were suspected of fraud, because the forms had been too well observed.

<sup>c</sup> In the Dig. 14, 2, 4, and the Guidon, ch. 5, art. 28, the rule is laid down in general terms, but most writers confine it to the cases mentioned in the text. See Beawes, 165; 2 Valin, 167. Yet see Wellwood, tit. 20.

<sup>d</sup> Dig. 14, 2, 2, 3; Hicks v. Palington, Moore, 297; see 22 Geo. 3, c. 25, and query if it affects this; Wellwood, tit. 18.

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*Expense incurred in relation to goods, &c.*

And not only may the loss of goods become the subject of general contribution, but also in some cases the expense incurred in relation to them.<sup>a</sup> Thus, if it be necessary to unlade the goods in order to repair the damage done to a ship, by *cutting* away her masts, or the like, so as to enable it to prosecute and complete the voyage, it seems that the expense of unlading, warehousing, and reshipping the goods, should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage.<sup>b</sup> The rule mentions goods only; but its principle extends also to the ship and its furniture; and all that I have hitherto said respecting the goods, is to be understood also of the provisions, the guns, the boat, or other tackle of the ship; *a fortiori*, it is also to be understood of goods belonging to the owner or master of the ship, as well as of those belonging to the merchant. Emerigon illustrates the case of the boat, by the relation of a stragem practised by one of his own countrymen. The master of a French vessel, having been pursued for several hours by two frigates, and having also his flight intercepted by the appearance of two other vessels ahead, hoisted, as soon as it became dark, his boat into the sea, furnished with a mast and sail, and a lantern at the mast-head, and then changed his course, and sailed during the whole night without any light on board his own ship; in the morning no enemy was in sight. The value of the boat, thus abandoned, was made good by general contribution.<sup>c</sup> If sails are blown away, or masts or cables broken by the violence of the wind, the owner alone must bear the loss.<sup>d</sup> The broken tools of an artificer bring no charge upon his employer. And this rule has been held to apply to the case of a mainmast broken in a heavy gale, by carrying an unusual press of sail, in order to escape from an enemy, to whom the ship had struck.<sup>e</sup> But if the master, compelled by necessity, *cut* his cable from the anchor, in order to use it as a hawser,<sup>f</sup> or if he cut away and abandon his masts, sails, or cables, to lighten and preserve the ship, their value must be made good by contribution.<sup>g</sup> In like manner<sup>h</sup> the damage voluntarily done to a ship by cutting its deck or sides in order to facilitate a necessary jettison, or by running it on a rock, shallow, or strand, to avoid the danger of a storm, or of an enemy, and the expense of recovering the ship from this latter situation;<sup>i</sup> and also the pilotage, port-duties, and other charges incurred by taking a ship into a port to avoid an impending peril, and the expense of an extraordinary assistance to preserve and secure a ship from the violence of a storm at its entrance into the port of destination, are to

<sup>a</sup> See the *Copenhagen*, 1 Rob. A. R. 289, and *Da Costa v. Newnham*, 2 Ter. Rep. 407, also the *Gratitudine*, 2 Rob. A. R. 257, where this seems to have been admitted.

<sup>b</sup> *Ante*, p. 46.

<sup>c</sup> Emerigon, tom. 1, p. 622.

<sup>d</sup> Dig. 14, 2, 2, 1, and 14, 2, 6; Wellwood, tit. 17; Roccus, Not. 60; Laws of Oleron, art. 9; Laws of Wisbuy, art. 12.

<sup>e</sup> *Covington v. Roberts*, 2 N. R. 378; *Taylor v. Curtis*, 6 Taunt. 608; and *ante*, p. 45.

<sup>f</sup> *Birkley v. Presgrave*, 1 East, 220.

<sup>g</sup> *Marshall v. Dutrey*, Select Cases of Evidence, p. 58; Dig. 14, 2, 3, and 5, 1.

<sup>h</sup> Dig. 14, 2, 2, 1.

<sup>i</sup> Laws of Wisbuy, art. 55; Molloy, b. 2, ch. 6, sect. 15; and see also *Beawes*, p. 165, and Wellwood, tit. 20; *Butler v. Wildman*, 3 B. & A. 403.

be sustained by a general contribution.<sup>a</sup> But the expense incurred CH. XVII.  
in a port, in which the ship may have taken refuge during the voyage, by repairing the damage done to the ship by tempest alone, seems with more propriety to fall upon the owners, and is so held to do in the civil law, and by many foreign writers.<sup>b</sup> And although the decision of the Court of K. B., in the case of *Da Costa v. Newnham*,<sup>c</sup> has been considered as an authority for a contrary doctrine, yet, in my humble judgment, the facts upon which that decision was founded, do not warrant such a conclusion.

Upon another point, relating to the situation of a ship taking refuge in a port to repair the damage occasioned by tempest in order to prosecute and complete the voyage, a reasonable doubt may be entertained, and our law-books furnish no decision. Some writers maintain generally that the wages and maintenance of the crew, during the delay thus necessarily incurred for the attainment of this object, are to be sustained by general contribution.<sup>d</sup> But the principle, upon which general contribution is founded, appears to me to furnish a distinction proper to be submitted to the consideration of the reader. *If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal. On the other hand, if the damage itself be not such as to be the object of contribution, by the same rule neither ought the collateral expenses incurred with regard to the repairs to become so.*<sup>e</sup> In answer to this it is urged, that as the repairs are necessary to the completion of the voyage, in the attainment whereof all are interested, all ought to contribute to the expense of this necessary delay. But it should be remembered, that it is the duty of the owners not only to provide a stout and sufficient ship at the commencement of the voyage, but also, as far as in them lies, to maintain the ship in a perfect condition during the whole course of the voyage, and almost every charter-party contains an express covenant to this effect. If the ship be not worth all the charges of repairs, as well direct as collateral, a consideration wholly different may take place; in the case now under examination, the ship is assumed by all parties to be worth the charge, at least the contrary supposition is not introduced into the argument: and why should the merchant be charged in any shape toward the performance of a duty incumbent on the owner? What is here offered, as to wages and maintenance, may perhaps apply also to port charges and other duties of the like nature incurred on the same account; and also to the value of a part of the cargo, that may happen to be sold by the master to defray the expense of the repairs; but the reader will consider the whole as propounded only for the consideration

<sup>a</sup> *Birkley v. Presgrave*, 1 East, 220, see *ante*, ch. 7, pt. 1.

<sup>b</sup> Dig. 14, 2, 6, and Emerigon, tom. 1, p. 625.

<sup>c</sup> 2 T. R. 407.

<sup>d</sup> *Beawes*, 166; Emerigon, tom. 1, p.

624. This is the practice at Pisa, as appears by the case of *Newman v. Cazallet*, Park Ins. 630, 7th Ed. But see *Code de Commerce*, art. 404.

<sup>e</sup> See *De Vaux v. Salvador*, 4 Ad. & E. 420.



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of the learned. And in one of the cases, which has been before quoted for another purpose, it appears that a general average had on an occasion of this sort been adjusted and settled by the parties; so that the point did not come before the Court.<sup>a</sup> There is indeed a decision of the Court of K. B., upon the construction of a charter-party, which may properly be mentioned in this place. A ship, chartered for a voyage to the East Indies and back, sprang a leak at sea on her return home, in consequence of which it became necessary to put into the Cape of Good Hope, and there take out the cargo in order to repair the ship. The ship, being repaired and re-laden, returned home in safety; and the owners claimed from the freighters a payment, in the nature of general average, toward the expense of the repairs, the maintenance of the crew, and other charges connected with the repairs. But the Court, considering the import of several clauses of the charter-party to be, that the owners should keep the ship in repair during the whole voyage at their own expense, and being also of opinion that the expressions used in another clause tended to show that the defendant was to be liable to general average in the case of jettison alone, held that upon the construction of this charter-party the plaintiff was not entitled to recover anything for the expenses thus incurred at the Cape.<sup>b</sup> With respect also to the wages and maintenance of the crew during the detention of a ship by the orders of a sovereign power, contradictory opinions are to be found in the works of writers on this subject.<sup>c</sup> Some authors have taken a distinction between the case of an embargo in the lading port, and the arrest and detention of a ship during the course of the voyage. The French Ordinance (of 1681) provided for the latter case, by declaring, that if the ship be hired by the month, the charges shall be reputed general average; but if hired for the voyage, the owners alone shall bear them.<sup>d</sup> The reason of this regulation is not easily discernible,<sup>e</sup> and it is in express contradiction to the spirit of another article of the same Ordinance on the subject of freight.<sup>f</sup> In the before-mentioned case of *Da Costa v. Newnham*, Mr. Just. Buller, speaking of this expense of wages and provisions during the detention of a ship by embargo, says, "The Court has said that the charges shall fall upon the owners only, and the freight must bear them." And this case does not seem to fall within the principle of the Rhodian law, because here the delay does not proceed from the act of the master or persons belonging to the ship; nor is it for the general benefit.

For the additional expense of the wages and maintenance of the crew incurred while a ship has been waiting for convoy, general contribution has sometimes been claimed; and three decisions of the different courts in Holland on this subject are related by Bynkershoeck, which seem worthy of notice in this place.<sup>g</sup> In the first case

<sup>a</sup> Hunter v. Prinsep, 10 East, 378.

<sup>b</sup> Jackson v. Charnock, 8 Ter. Rep. 509.

<sup>c</sup> Emerigon, tom. 1, p. 631; Beawes, 165.

<sup>d</sup> Liv. 3, tit. 7; Des Avaries, art. 7.

<sup>e</sup> But see Pothier, Ch. Partie, 85; Emerigon, tom. 1, p. 539.

<sup>f</sup> Liv. 3, tit. 3; Du Fret, art. 16.

<sup>g</sup> Bynk. Q. Juris Privati, lib. 4, c. 25.

the master of a general ship, which was armed, and had letters of CH. XVII. marque, and was bound to several Italian ports, during a war between the Dutch and French, gave public notice of his intention to receive goods, and to sail for those ports, without the company of other ships. Having received a cargo, he set sail under convoy of a ship of war destined for Portsmouth, entered with her the harbour of that place, and there waited a whole year for another convoy, under which he sailed to Cadiz, and there waited a second year for a third convoy, under which he sailed to Italy, and delivered his cargo there. Under these circumstances the master sued the merchants for general average, and obtained a decree in his favour, which was confirmed by one court of appeal, reversed by a second, and at last finally affirmed by the Senate, of which the learned author was then a member; against his opinion, and against the general principles of law on this subject, and against the particular engagement made by the master on this occasion. This judgment appears to have been disapproved of in Holland; for, in another case, which happened soon afterwards, where five Dutch vessels coming from Surinam, and learning on their voyage that a war had broken out between the Dutch and French, put into Plymouth, and there waited for convoy; which case also went through all the same tribunals, the Senate decreed against the claim of contribution. A third case happened soon afterwards, in which the same four courts successively decreed in favour of the claim. But of this the circumstances were very different from the two former, and such as seem to warrant the judgments pronounced in it. It was the case of a ship freighted from Amsterdam to Cadiz, with a stipulation to sail with convoy either to that place or as far as Lisbon. The ship accordingly sailed under convoy of a man-of-war, in company with several other vessels, and when she came near Lisbon, fell in with a fleet of privateers, by which some of the other vessels were captured, and the ship in question put into Lisbon in obedience to a signal from the man-of-war, and there waited six months before she could safely proceed to Cadiz. In this case it is to be observed, that the master put into port to avoid an extraordinary and impending peril, and not merely as a matter of general caution to avoid the ordinary dangers always accompanying a state of warfare. And the expense thus incurred appears perfectly analogous to the cases of jettison, and to fall within the principle of the Rhodian law. For in this case, as the learned author observes, it is clear that there was a present and impending peril; and it is clear also, that the voyage was delayed, not by any accident, but by design, in order to avoid the peril. The ordinance of the Hanse Towns also mentions as an object of general average the expense of healing <sup>Expense</sup> caused by mariners wounded in the defence of the ship against the attack of <sup>pirates, &c.</sup> pirates: "I have already mentioned the provisions made by the legislature of this country for persons of this description." On the expense of repairing the injury done to a ship during a combat, foreign writers differ in opinion.<sup>c</sup> In the "Guidon," an injury done to the

<sup>a</sup> Art. 35.

<sup>b</sup> *Ante*, ch. 7, pt. 1.

<sup>c</sup> 2 Valin, 166; Pothier, *Traité des*

<sup>e</sup> Avaries, sect. 2, num. 144 & 154; Emerigon, tom. 1, p. 628.

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cargo by the shot of a cannon, is said to be a charge upon the merchant only.<sup>a</sup> But, by the law of England, neither the expenditure of ammunition in resisting capture, nor the damage done to the ship in the combat, nor the expense of curing the wounded sailors, is the subject of general average.<sup>b</sup> By the law of most of the continental nations of Europe the injury done by one ship to another, or to its cargo, without fault in the person belonging to either ship, is to be equally borne by the owners of the two vessels;<sup>c</sup> and this doctrine is advanced by many foreign writers; it therefore becomes necessary to observe here, that by the law of England, in the case of damage happening in this manner either to ship or cargo, by mere misfortune and without fault in any one, the proprietors of the ship or cargo injured must bear their own loss.<sup>d</sup> I have already mentioned that such a misfortune is considered as a peril of the sea. And in this respect the law of England agrees with the civil law.<sup>e</sup>

*Safety,  
meaning of.*

Hitherto we have considered the losses, which are to be compensated by general contribution, as being the price of safety, *but this is not to be understood of absolute and perfect safety, by arrival and delivery, at the port of destination.* If temporary safety be obtained by the loss; if the ship survive the storm, or escape the enemy, and be afterwards cast away by another tempest, and goods be saved from the wreck, the clear value of the goods so saved must be contributory to the original loss, because without that loss even this diminished value has had no existence.<sup>f</sup> The abandonment of goods on these occasions, although it be the act of man, is not considered to be so far voluntary as to divest the property of the merchant, and give a title to any person, who may find and save them: but from such person the merchant may reclaim them on payment of salvage;<sup>g</sup> and if he is able to do so, their clear value is to be deducted from the contribution, or paid to the contributors. It has been observed in a preceding part of this treatise, that when an entire ship is taken to freight by a merchant, the master must not take on board the goods of other persons without his consent: from whence I apprehend it will follow that if goods so wrongfully shipped be afterwards cast overboard to lighten the vessel, the merchant freighter ought not to contribute to the loss. The French Ordinance (of 1681) in express terms excluded from the benefit of general average goods stowed upon the deck of the ship,<sup>h</sup> and the same *general* rule prevails in practice in this country. Goods so stowed may in many cases obstruct the management of

*Whether  
jettison di-  
vests own-  
er's prop-  
erty.*

<sup>a</sup> Ch. 5, art. 4.

<sup>b</sup> *Taylor v. Curtis*, 6 Taunt. 608. The law also as to wages, repairs, maintenances of the crew, and the like, is now quite settled, *ante*, ch. 7, pt. 1.

<sup>c</sup> Ord. of Oleron, art. 14 of Wisbuy, art. 26, 50, 67, & 70; French Ord. (of 1681), liv. 3, tit. 7; Des Avaries, art. 11, and Valin thereon; *Code de Commerce*, art. 407; Bynkershoek, Q. Jur. Priv. lib. 4, ch. 18, 19, 29, & 21; and *De Vaux v. Salvador*, 4 Ad. & E. 420.

<sup>d</sup> See *De Vaux v. Salvador*, 4 Ad. & E. 420.

<sup>e</sup> Dig. 9, 2, 29.

<sup>f</sup> Dig. 14, 2, 4, 1; Vinnius in *Peckium*, p. 246, 250.

<sup>g</sup> Dig. 14, 2, 2, 8, & 14, 2, 8; in *Tucker v. Capps*, 2 Roll. Rep. 498; Mr. J. Dodderidge said the proprietor of the goods may bring an action of trover against the finder.

<sup>h</sup> See Ord. of Wisbuy, art. 46.

<sup>i</sup> Liv. 3, tit. 8; Du Fret. art. 13.

the vessel, and, except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant.\* CH. XVII.

In the second place let us consider the articles, that are to contribute to make good these losses. And these are all merchandise conveyed in the ship for the purposes of traffic, whether belonging to merchants, to passengers, to the owner, or to the master, of whatever kind, and however small be their weight<sup>b</sup> in comparison to their value.<sup>c</sup> For the contribution is made not on account of incumbrance to the ship, but of safety obtained. Therefore in this country bullion and jewels contribute according to their full value.<sup>d</sup> For slaves also, when considered as a species of merchandise, their proprietors contributed according to their value;<sup>e</sup> although this dreadful traffic had not extended so far as to authorise the casting these unhappy persons into the sea, and making their loss an object of contribution.<sup>f</sup> But as no estimation can be made of the value of the life of a free man, neither passengers, nor crew, are to contribute for their personal safety.<sup>g</sup> Neither in this country do the wearing apparel, jewels, or other things, belonging to the persons of passengers, or crew, and taken on board for their private use, and not for traffic, contribute on these occasions.<sup>h</sup> And Emerigon informs us that the same practice prevailed in France, although the Ordinance of Louis XIV. did not exempt these articles.<sup>i</sup> Both the ship and the freight gained in the voyage are now everywhere contributory, although formerly in some countries contribution was made for the value of one only.<sup>k</sup> But the owners do not contribute for the victuals or ammunition of the ship. In France, and many other of the continental states, contribution is made in some cases for the whole, in others for a moiety only of the ship and of the gross freight. *In this country the owners contribute according to the value of the ship at the end of the voyage, and the clear amount of the freight or earnings of the voyage, after deducting the wages of the crew, and other expenses of the voyage.*<sup>l</sup> The mariners do not contribute for their wages.<sup>m</sup> \* \* \* They are exempted from contribution, lest the apprehension of per-

What contributes.

\* See Gould v. Oliver, 2 Sc. N. R. 241; Milward v. Hibbert, 2 G. & D. 147; ante, p. 5.

<sup>b</sup> Dig. 14, 2, 2, 2; 1 Mag. p. 62, 63; Emerigon, tom. 1, p. 639.

<sup>c</sup> Lord Kaim admits this rule, but controverts its propriety, and contends that the contribution should be according to weight and not value. Prin. of Eq. p. 116. I cannot think his arguments satisfactory.

<sup>d</sup> 1 Mag. p. 62, 2 G. & D. 146, *supra*.

<sup>e</sup> Dig. 14, 2, 2, 2.

<sup>f</sup> Emerigon, tom. 1, p. 610, 646.

<sup>g</sup> Dig. 14, 2, 2, 2.

<sup>h</sup> 1 Magens, pp. 62, 63. But by the Civil Law the rule was otherwise, Dig. 14, 2, 2, 2.; and a contrary rule is also laid down in the Guidon, ch. 5, art. 26, upon which, however, Cleirac observes

that the Ordinances of different states vary.

<sup>i</sup> Tom. 1, p. 645, &c.

<sup>k</sup> Emerigon, tom. 1, p. 648, &c. and Ordin. of Wisbuy, art. 40. By the Law of which country adjustment is made. Power v. Whitmore, 4 M. & S. 141; Simonds v. White, 2 B. & C. 805.

<sup>l</sup> See Williams v. L. Ass. Co. 1 M. & S. 318.

<sup>m</sup> Emerigon, tom. 1, p. 642; French Ord. of 1681, liv. 3, tit. 4; Des Loyers des matelots, art. 20, and Valin thereon, who gives this construction to the word *omnes* in the sentence "*si navis a piratis redempta sit, Servius Ofilius, Laqueo, omnes contribuere, debere aiunt.*" Dig. 14, 2, 2, 3; see also *Code de Commerce*, art. 304.

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Mode of  
calculating  
contribu-  
tion.

sonal loss should restrain them from the execution of the measures necessary to general safety; and the peril and extraordinary hardships endured by them on these disastrous occasions will entitle them to an exemption from further distress.

Lastly, as to the mode of contribution. By the civil law, the goods cast overboard were valued only at their invoice price or prime cost.<sup>a</sup> A practice formerly prevailed in this country to adopt this valuation, if the loss happened before half the voyage was performed, but, if it happened afterwards, then to value the goods at the clear price, which they would have fetched at the place of destination;<sup>b</sup> and this practice still exists in many places abroad;<sup>c</sup> but here the last valuation is now adopted in all cases, where the average is adjusted after the ship's arrival at the place of destination, and appears best to agree with the nature of the subject;<sup>d</sup> for although, as between the proprietor and the insurer of goods, the prime cost is the only value, the contract of insurance in that case being a contract of indemnity against loss, and not a contract for the security of gain; yet in this case equity requires that the person, whose loss has procured the arrival of the ship at the place of destination, should be placed in the same situation with those, whose property has arrived at that place; which can only be done by considering his goods as having arrived there also. But if the ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted, in this case the goods only contribute according to the invoice price; for the price of sale is unknown. And with regard to the loss of masts, cables, and other furniture of the ship, as the new articles purchased will in general be of greater value than the articles lost, it is usual to compound the difference by deducting *one-third* from the price of the new articles.<sup>e</sup> Supposing therefore a general average to be settled upon the ship's arrival at the port of destination, according to the principles before advanced, it is necessary in the first place to take an account of the several losses, which are to be made good by contribution: in the second place, to take another account of the value of all the articles that are to contribute; in which must be included the value of the goods, &c., thrown overboard, for otherwise the proprietors of those goods will receive their full value, and pay nothing toward the loss. But as this will be most easily understood by an example in figures, I propose the following case; wherein the reader will suppose that it became necessary in the D., to cut the cable of a ship destined for H.; that the ship afterwards struck upon the G., which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship,

<sup>a</sup> Dig. 14, 2, 2, 4.

<sup>b</sup> Malyne, p. 113, and Molloy, b. 2, ch. 6, s. 6; Wellwood, tit. 21.

<sup>c</sup> Emerigon, tom. 1, p. 654; Vinnius in Peckium, p. 220.

<sup>d</sup> It is also the rule of the Ord. of Wisbuy, art. 39.

<sup>e</sup> This rule of deducting *one-third* is

applicable to cases of *contract*, as policies of Insurance; but not to cases of *tort* as cases of collision. In the latter, the measure is the extent of the damage *restitutio ad integrum*. The Gazelle, 2 Wm. Rob. 279; the Mary Caroline, 3 Ib. 101; the Columbus, Ib. 162.

being cleared from the sands, was forced to take refuge in R. CH. XVII.  
harbour to avoid the further effects of the storm.

| AMOUNT OF LOSSES.                                                                                                          |       | VALUE OF ARTICLES TO CONTRIBUTE.                                 |        |
|----------------------------------------------------------------------------------------------------------------------------|-------|------------------------------------------------------------------|--------|
|                                                                                                                            | £     |                                                                  | £      |
| Goods of A. cast overboard . . .                                                                                           | 500   | Goods of A. cast overboard . . .                                 | 500    |
| Damage of the goods of B. by the jettison . . . . .                                                                        | 200   | Sound value of the goods of B. deducting freight and charges . . | 1000   |
| Freight of the goods cast overboard                                                                                        | 100   | Goods of C. . . . .                                              | 500    |
| Price of a new cable, anchor, and mast . . . . .                                                                           | 300   | Of D. . . . .                                                    | 2000   |
| Deduct one-third . . . . .                                                                                                 | 200   | Of E. . . . .                                                    | 5000   |
| Expense of bringing the ship off the sands . . . . .                                                                       | 50    | Value of the ship. . . . .                                       | 2000   |
| Pilotage and port duties going into the harbour and out, and commission to the agent, who made the disbursements . . . . . | 100   | Clear freight, deducting wages, victuals, &c. . . . .            | 800    |
| Expenses there . . . . .                                                                                                   | 25    | Total of contributory values                                     | 11,800 |
| Adjusting this average . . . . .                                                                                           | 4     |                                                                  |        |
| Postage . . . . .                                                                                                          | 1     |                                                                  |        |
| Total of losses                                                                                                            | 1,180 |                                                                  |        |

£       £       £       £  
Then 11,800 : 1,180 :: 100 : 10:

That is, each person will lose 10 per cent. upon the value of his interest in the cargo, ship, or freight.

|                        |      |
|------------------------|------|
| Therefore A. loses . . | £ 50 |
| B. " . .               | 100  |
| C. " . .               | 50   |
| D. " . .               | 200  |
| E. " . .               | 500  |
| The Owners " . .       | 280  |

Total 1,180, which is the exact amount of the losses.

Upon this calculation the owners are to lose 280£., but they are to receive from the contribution 380£., to make good their disbursements, and 100£. more for the freight of the goods thrown overboard, or 480£. minus 280£.

|                                                                             |       |
|-----------------------------------------------------------------------------|-------|
| They therefore are actually to receive . . . . .                            | £ 200 |
| A. is to contribute £50, but has lost £500; therefore A. is to receive . .  | 450   |
| B. is to contribute £100, but has lost £200; therefore B. is to receive . . | 100   |
| Total to be actually received                                               | 750   |

|                                                                               |            |
|-------------------------------------------------------------------------------|------------|
| On the other hand C. D. & E. have lost nothing, and are to pay as } C. . . 50 | £          |
| before, viz. :— . . . . . } D. . . 200                                        |            |
|                                                                               | E. . . 500 |
| Total to be actually paid                                                     | 750        |

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which is exactly equal to the total to be actually received, and must be paid by and to each person in rateable proportion, to be ascertained by another calculation, with which it is unnecessary to trouble the reader. In the above estimate of losses I have included the freight of the goods thrown overboard, which appears to be proper, as the freight of these goods is to be paid, and their supposed value is taken clear of freight, as well as other charges, although this article is omitted in the example proposed by Pothier.<sup>a</sup> But I find it charged in an adjustment of general average given by Magens.<sup>b</sup> By the civil law the master of the ship was required to take care to have the contribution settled, and to receive the sums to be contributed, and pay them over to the losers, and might sue and be sued for them, or might retain the goods for the sums to be contributed by their proprietors.<sup>c</sup> The same power of retaining the goods is given to the master by the French Ordinance (of 1681), and even the further power of sale, under the authority of a magistrate, to the amount of the sums to be contributed.<sup>d</sup> But Valin acquaints us that this power is never in fact exercised in his country.<sup>e</sup> Indeed, where contribution is to be made according to the price of the goods at the place of destination, the exercise of this power is incompatible with the mode of adjustment. In this country, which has no peculiar forum established for these matters, but in which the practice of insurance is very general, it is usual for the broker who has procured the policy of insurance, to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute.

Contribution, how recovered.

In case of dispute, the contribution may be recovered either by a suit in equity<sup>f</sup> or by an action at law,<sup>g</sup> instituted by each individual entitled to receive against each party that ought to pay, for the amount of his share. And in the case of a general ship where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.<sup>h</sup>

<sup>a</sup> *Traité des Avaries*, num. 133.

<sup>b</sup> 1 Magens, 289.

<sup>c</sup> Dig. 14, 2, 2; see Wellwood, tit.

21.

<sup>d</sup> Liv. 3, tit. 8; Du Jet, art. 21.

<sup>e</sup> Tom. 2, p. 211.

<sup>f</sup> *Shepherd v. Wright*, Shower's P. C. 18.

<sup>g</sup> *Marshall v. Dutrey*, select cases of Evid. 58; *Birkley v. Presgrave*, 1 East, 220.

<sup>h</sup> So deposed by a gentleman very conversant with this business in the case of *Myer v. Vander Deyl*. Guild. before Ld. Ellenborough, Ch. J. Dec. 1803.

## CHAPTER XVIII.

## CH. XVIII.

STOPPAGE IN TRANSITU.<sup>a</sup>

WHEN goods have been shipped upon credit, and the consignee has become a bankrupt or insolvent, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, allows him, in many cases, to countermand the delivery, and before or at their arrival at the place of destination, to cause them to be delivered to himself, or to some other person for his use. This is usually called stoppage in transitu.

This practice was first sanctioned and established in the Court of Chancery, but has been since frequently recognised and carried into effect by the Courts of law.<sup>b</sup> It is founded on principles of natural justice and equity. But the law of England is in this respect more favourable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods than the ancient civil law, or the modern law of many European nations, which is chiefly founded on the civil law; for the civil law did not, in general, consider the transfer of property to be complete by sale and delivery alone without payment or security for the price, unless the seller agreed to give a general credit to the buyer for it; but allowed the seller to reclaim the goods out of the possession of the buyer, as being still the seller's own property.<sup>c</sup> And by the general law of France, in the case of insolvency, "the seller, who has sold a thing, and still lies out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may seize on it, and he is not obliged to share it with the other creditors of the buyer. And it would be the same thing, nay, and with much more reason, if the owner of the thing had given (delivered) it to the debtor to sell for him."<sup>d</sup> Whereas, by the general law of England, when goods have been delivered into the actual or constructive possession of the buyer, they cannot be reclaimed; although if found remaining unsold in the hands of an insolvent factor, they may be reclaimed, because a delivery to a factor does not of itself alter the property. The law of England, however, will lend

Now a legal right.

Civil law.

Lex loci contractus.

<sup>a</sup> See *Lickbarrow v. Mason*, 1 Smith's L. C. 388; *Van Casteel v. Booker*, 2 Exch. 710; *Turner v. the Trustees of the L. Docks*, 6 Ib. 543; *Brown v. North*, 8 Ib. 5.

<sup>b</sup> See *Lickbarrow v. Mason*, *supra*.

<sup>c</sup> Dig. 18, 1, 19; see also Ib. eod. tit. 53, and Dig. 19, 1, 13, 8 and 14, 4, 5, 18.

<sup>d</sup> Domat's Civil Law, b. 4, tit. 5, s. 2, art. 3; see also the notes of the same author on that article, and on b. 3, tit. 1, s. 5, art. 3, where it appears that by

the custom of some parts of France a person who has sold goods expecting to be paid immediately, may, if he is not paid, retake the goods even out of the possession of a subsequent purchaser.

<sup>e</sup> In case of a sale of land, if the purchase-money is not paid, the Court of Chancery considers the purchaser as a trustee for the seller. *Pollexfen v. Moore*, 3 Atkyna, 272; and see *Blackburn v. Gregson*, 1 Brown's Rep. in Chancery, 420.



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its aid to carry into effect the more enlarged rule of equity which exists in another country, upon a transaction taking place there, as appears by the following case. By the law of Russia, "If, in case of unpaid debts or bankruptcies, anybody has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loadeth on board of ship or vessel goods or cargo, in such a case the creditor is to give notice in town <sup>a</sup> to the head Judge of the Court (in districts to the chief), that the ship or vessel, or goods, or the whole cargo, should be retained time enough until the full payment is made to whom due." "In consequence whereof, and by virtue of that law, if the seller or shipper, in case of bankruptcies, can identify that the merchandise belonging to him is in Russia in ships, warehouses, or wherever they may be, in such a case the goods must be given back to the sellers or shippers, being their property, and cannot be brought in concurs,"<sup>b</sup> that is, into the general mass of the buyer's effects, to be distributed among his creditors. Messrs. B. & Co., of St. Petersburg, in pursuance of directions from one C., of London, and as factors for him, shipped a cargo of Russian commodities at St. P., and on board a ship chartered by C., and sent invoices thereof, and a bill of lading of part to him; but learning before the ship's departure, that some bills drawn by them on him in consequence of a previous transaction were unpaid, they procured from the master of the vessel bills of lading to their own order, and sent them to a friend in L., and informed C. that he might have the bills of lading upon giving security to their friend for payment of the bills of exchange to be drawn for the amount of the goods, otherwise their friend would sell the goods on C.'s account, and apply the proceeds in discharge of the bills of exchange. C., in fact, had committed an act of bankruptcy before any of the goods were shipped. On the arrival of the ship in L., his assignee demanded the goods of the master, and offered to pay the freight, &c., but the master delivered them to the friend of B. & Co., on their account, in conformity to their indorsement of the bills of lading. Whereupon the assignees of C. brought an action against the master; and the Court held that the law of Russia in this case ought to prevail, although B. and Co. had not actually taken the goods out of the ship, or instituted legal process for the recovery of them, considering the master's signature of bills of lading to their order to be equivalent to a stopping in transitu, or re-delivery to them, and to have rendered it unnecessary for them to have recourse to the compulsory process of the law.<sup>c</sup> In this case, recourse was had to the law of Russia to sustain the right of the consignor, because the ship had been chartered by the consignee, and it was then supposed that the right of stopping in transitu did not apply to the case of goods shipped on board a vessel of that description. The contrary, however, has been since decided in another case that arose out of the same transaction.<sup>d</sup>

<sup>a</sup> Qu. Whether this should not be "towns" or "a town?"

<sup>b</sup> Merc. Nav. Laws of Russia, pub-

lished 25th June, 1781, sect. 138.

<sup>c</sup> *Ingles v. Usherwood*, 1 East, 515.

<sup>d</sup> *Bohtlingk v. Ingles*, 3 East, 381.

But to return to the law of England. Let us consider, 1st., in what CH. XVIII. cases, generally, goods may be stopped in transitu; 2ndly, under what circumstances goods are deemed to be in transitu, and what not; and, lastly, by what acts the right of the consignor may be taken away before the end of the transit.

1st, it should be observed that the act of stopping in transitu is an adverse act on the part of the consignor against the consignee. In what cases goods may be stopped. If a consignee, after an act of bankruptcy, deliver up the bills of lading to another person, upon his undertaking to apply the proceeds of the goods in discharge of bills of exchange drawn for the price, and he accordingly receive the goods, he cannot retain them against the assignees of the bankrupt, although the original consignor afterwards approve of the arrangement; and it seems that the law would be the same, even if the person with whom such an arrangement should be made, were at the time an agent of the consignor.<sup>a</sup> But if the delivery of goods be countermanded by the consignor,<sup>b</sup> the goods having been consigned upon credit, and the consignee having failed<sup>c</sup> or become bankrupt, it is the duty of the master to obey the countermand, and deliver the goods, not to the consignee, but to the order of the consignor. Such countermand and substitution of a new consignee are most easily effected, if the bill of lading is originally made for delivery to the order of the consignor; because in that case the consignor may, if he has reason to suspect the failure, or is afterwards apprised of it, send another part of a bill of lading to a correspondent at the port of destination, indorsed in blank, or for delivery to him. But the countermand may also be made in the event before mentioned, if the consignee is originally named in the body of the bill of lading.<sup>d</sup> For the right of stopping in transitu does not depend upon a supposition that the property has not passed from the consignor, but, on the contrary, is founded on an admission that the property has become vested in some other person. No question can ever be made upon the right of a man to seize his own goods; but the question in cases of stoppage in transitu generally is whether, under the circumstances, the consignor may divest the property which has passed to another, and revest it again in himself.<sup>e</sup>

A person abroad, who, in pursuance of orders sent by a merchant of this country, purchases goods on his own credit of others whose names are unknown to the merchant, and who charges the merchant a commission on the price, and consigns them to him, is a consignor within the meaning of this rule; in reality, he is the vendor,

<sup>a</sup> *Siffken v. Wray*, 6 East, 371.

<sup>b</sup> To make a notice effective it must be given to the person who has the immediate custody of the goods; or, if given to the principal when several have the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of *reasonable diligence*, may communicate it to his servant in time to prevent the delivery to the consignee. *Whitehead v. Anderson*,

9 M. & W. 534.

<sup>c</sup> "*Failed*." The usual term is "*insolvent*," which means a general inability to pay his debts; see *Biddlecombe v. Bond*, 4 Ad. & E. 332.

<sup>d</sup> *Burghall v. Howard*, 1 H. Bl. 365. When the goods are put on board the consignee's own ship, *post*, p. 241.

<sup>e</sup> See *Lickbarrow v. Mason*, 1 Smith's L. C. 388.

<sup>f</sup> *Feise v. Wray*, 3 East, 93.

Abbott on Shipping. and the consignee the vendee.<sup>f</sup> So also is a person who sends goods to be sold on the joint account of himself and the consignee.<sup>a</sup> But a person who becomes surety for the consignee, by accepting bills drawn for the price of goods by the vendor, is not a consignor within this rule, although the bills be sent through his hands to the consignee.<sup>b</sup> If the consignor indorse and transmit the bill of lading, in pursuance of an agreement, and in trust to indemnify against acceptances, or the like, he cannot countermand the delivery and take back the goods, while the trust and object of the consignment remain unsatisfied; nor must the master re-deliver them to him.<sup>c</sup> So, if goods be sent by order of the consignee, on his account, and at his risk, and the consignor draw bills of exchange upon him for the price, and indorse and transmit the bill of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivering them, the consignee being willing to accept the bills and not having failed in his circumstances.<sup>d</sup>

Who cannot exercise the right. This right of stopping goods in transitu does not belong to a person who had only a lien upon them, without a property in them; and therefore, if a fuller or dyer, who has fullered or dyed cloths, and who is not obliged to part with the possession of them until the price of fulling or dyeing them is paid, put them on board a ship for delivery to his employer, in pursuance of his orders, and the employer fail, the fuller or dyer cannot countermand the delivery, because his lien and right to retain the cloth ceased as soon as he parted with the possession of them.<sup>e</sup> But in a recent case it was held that a person in whom, at the time of the stoppage, the property had not vested, but who had only an interest in a contract for the delivery of them to him, might exercise the right of stoppage in transitu.<sup>f</sup>

Effect of.

Whether stoppage *in transitu* rescinds the contract, and so revests the *property*, or merely restores the right of *possession*, has not been solemnly decided. The better opinion seems to be that it does not rescind the contract.<sup>g</sup>

Bill given for price, &c.

A consignor may exercise this right, although a part of the price of the goods has been paid by the consignee,<sup>h</sup> or a bill of exchange has been accepted by him for the whole, and indorsed over to a third person.<sup>i</sup> And an usage for land carriers to retain goods as a security for the general balance of account due from the consignee will not prevent the consignor from reclaiming them out of their hands, upon paying the price of the carriage of the particular goods only.<sup>k</sup> Nor will a similar usage, when the carrier is to be paid by the consignor,

<sup>a</sup> Newsom v. Thornton, 6 East, 17.

<sup>b</sup> Siffken v. Wray, 6 East, 371.

<sup>c</sup> Haille v. Smith, 1 B. & P. 563.

<sup>d</sup> Walley v. Montgomery, 3 East, 585; *vide*, also the *Constantia*, 6 Rob. A. R. 321.

<sup>e</sup> Sweet v. Pym, 1 East, 4.

<sup>f</sup> Jenkyns v. Usborne, 8 Sc. N. C. 522.

<sup>g</sup> Brandt v. Bowlby, 2 B. & Ad. 932; Clay v. Harrison, 10 B. & C. 92;

Edwards v. Brewer, 2 M. & W. 379; James v. Griffin, 1b. 632; Wentworth v. Outhwaite, 10 Ib. 449; Wilmshurst v. Bowker, 8 Sc. N. C. 585.

<sup>h</sup> Hodgson v. Loy, 7 T. R. 440; Edwards v. Brewer, 2 M. & W. 377.

<sup>i</sup> Feise v. Wray, 3 East, 93; Jenkyns v. Usborne, 8 Sc. N. C. 520.

<sup>k</sup> Oppenheim v. Russell, 3 B. & P. 42.

authorise the carrier to detain goods from the consignee who has paid the price of them.<sup>a</sup> CH. XVIII.

2. Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water,<sup>b</sup> or land;<sup>c</sup> and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee. When goods are deemed to be *in transitu*.

If goods are sent by sea to a certain port to be forwarded from thence by land to the residence of the consignee, and upon the ship's arrival at the port are delivered to a wharfinger, who receives them on the part of the consignee, to be forwarded to him accordingly, they are subject to this right of the consignor in the hands of the wharfinger;<sup>d</sup> and the law is the same in case of delivery to a packer appointed by the buyer;<sup>e</sup> unless the warehouse of the packer be used by the buyer as his own, and be the place of the ultimate destination of the goods.<sup>f</sup> So, as I have before observed, the master of a ship chartered wholly by the consignee is now held to be a carrier in whose hands goods may be stopped.<sup>g</sup> But where a ship had been hired by the consignee for a term of years, and was fitted out, victualled, and manned by him, and goods were put on board thereof, to be sent by him on a mercantile adventure, for which he had bought them, it was held that the consignor could not stop them; the consignee being in that case the owner of the ship *pro tempore*, and the delivery of the goods on board thereof being equivalent to a delivery into a warehouse belonging to him.<sup>h</sup> But this case of *Fowler v. M'Taggart*, even as explained in *Bohtlingk v. Inglis*, is not now, at least, an authority for so broad a proposition. For it is now clear that there may be a delivery on board the purchaser's own ship, and yet not a delivery to him. For instance, goods are put on board the purchaser's own ship, and the bill of lading makes them deliverable to consignee or assigns; the form of the bill of lading shows that the consignor did not intend, by the act of shipment, to part with the right of disposing of them, and the jury would be directed so to conclude.<sup>i</sup> In a case of goods sent by a waggon, which arrived at the inn in L., where the waggon usually put up, and were there attached by a creditor of the

<sup>a</sup> *Butler v. Woolcot*, 2 N. R. 64; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 83.

<sup>b</sup> *Stokes v. La Riviere*, cited in 3 T. R. 466; in the possession of a third party, *Gibson v. Carruthers*, 8 M. & W. 328.

<sup>c</sup> *Hunter v. Beal*, cited in 3 T. R. 466; *James v. Griffin*, 2 M. & W. 634; *Wentworth v. Outhwaite*, 10 M. & W. 450, and cases cited. Place of destination means "the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition." See also *Dodson v. Wentworth*, 5 Sc. N. C. 831; *Smith v. Goss*, 1 Camp. 282; *Stokes v. La Riviere*,

cited in 3 East, 397; *Dixon v. Baldwin*, 5 East, 174; *Allan v. Gripper*, 2 Cr. & J. 218; *Foster v. Frampton*, 6 B. & C. 107; *Coates v. Railton*, 1b. 427.

<sup>d</sup> *Mills v. Ball*, 2 B. & P. 457.

<sup>e</sup> *Hunt v. Ward*, cited in 3 T. R. 467.

<sup>f</sup> *Scott v. Pettit*, 3 B. & P. 469; see *James v. Griffin*, 2 M. & W. 634.

<sup>g</sup> *Bohtlingk v. Inglis*, 3 East, 381; *ante*, p. 238.

<sup>h</sup> *Fowler v. M'Taggart*, cited in 7 T. R. 442.

<sup>i</sup> *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, 1b. 691; *Turner v. Trustees of L. Docks*, 6 Ib. 332; *Brown v. North*, 8 Ib. 5.

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vendee, according to the custom of L., and which in that situation were claimed by his assignee, he having become bankrupt, and marked by the assignee, it was held that the vendor could not afterwards countermand the delivery, the goods being deemed to have arrived at the end of their destined journey, and the assignee to have done that which was equivalent to taking actual possession, the removal of the goods being impracticable on account of the attachment.<sup>a</sup> The question arose between the vendor and the assignee, who, after a claim made by the vendor, obtained possession of the goods, the attachment being taken off. An attachment of this sort laid upon goods in the hands of a wharfinger does not defeat the right of the consignor.<sup>b</sup> A delivery of goods to an agent of the buyer residing at a sea-port, with whom they are to remain until the buyer sends orders for shipping them to a foreign country, is in effect a delivery to the buyer. As between him and the seller the goods have arrived at the end of their journey. The subsequent shipment would be the commencement of a new journey under the direction of the buyer.<sup>c</sup> Where a ship, which ought to have performed quarantine, came into port without doing so, and the assignees of the consignee, who had received the bill of lading, but had become bankrupt, went on board immediately, and claimed the goods, and opened some of the chests, and put a person on board to keep possession, and the ship being on the same day ordered out of port to perform quarantine, an agent of the consignor, having received another bill of lading, claimed the goods of the master during the performance of quarantine; it was held by L.J. Kenyon, at the trial of an action brought by the consignor against the assignees, who afterwards obtained possession of the goods, that the right of the consignor to stop the goods *in transitu* existed when the claim was made on his behalf, because the voyage was not at an end until the performance of the quarantine, and the consignee had no power to divest the right of stopping *in transitu*, by taking possession before the conclusion of the voyage. The plaintiff obtained a verdict, and the opinion of his lordship was afterwards sanctioned by the Court of K. B. on an application for a new trial. The doctrine of this case is in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver the goods at the place of destination, and which, therefore, gives no authority to the consignee to demand them before their arrival at that place.<sup>d</sup> But it is still a moot point whether the consignee can anticipate the regular determination of the transit.<sup>e</sup> Thus much, however, is settled,—that if the carrier's consent be not obtained, and the consignee take the goods, the right of stoppage *in transitu* is not determined thereby.<sup>f</sup> By an Act of Parliament made for

<sup>a</sup> *Ellis v. Hunt*, 3 T. R. 464.

<sup>b</sup> *Smith v. Goss*, 1 Camp. 282; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 83.

<sup>c</sup> *Dixon v. Baldwin*, 5 East, 175; see also *Leeds v. Wright*, 3 B. & P. 320.

<sup>d</sup> *Holst v. Pownal*, 1 Esp. 242.

<sup>e</sup> *Wright v. Lawes*, 4 Esp. 82; *Mills v. Ball*, 2 B. & P. 461; *Oppenheim v.*

*Russell*, 3 Ib. 54; *Foster v. Frampton*, 6 B. & C. 107; *James v. Griffin*, 2 M. & W. 633; *Allan v. Gripper*, 2 Tyr. 217; *Tucker v. Humphrey*, 4 Bing. 516; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 83.  
<sup>f</sup> *Whitehead v. Anderson*, 9 M. & W. 535; *Jackson v. Nichol*, 5 Bing. N. C. 508.

securing the duties payable upon the importation of wine, the proprietor, importer, or consignee, was required, within 20 days after the ship had been entered at the Custom-house, to make an entry of the wine, pay the duties, and land the wine; upon failure, the wine was to be conveyed to the King's warehouse, and, if the duties were not paid within three months, was to be publicly sold, to defray the duties and expenses, and the overplus, if any, was to be paid to the proprietor or other person authorised to receive the same.<sup>a</sup> This statute has given occasion to a question upon the subject now under consideration. A quantity of wine arrived here consigned to L. & C., by whom it was ordered, and who had accepted a bill drawn upon them for the amount. They did not enter, or pay the duties for it within 20 days, but before the expiration of that period became bankrupts, and the bill accepted by them was not paid. The wine was conveyed to the King's warehouse according to the statute. The assignees of L. & C. first, and after them an agent of the consignor, claimed the wine of the officers of revenue within the three months. The wine, however, was not delivered to either party, but was publicly sold at the expiration of the three months, and the assignees of L. & C. brought an action against the broker for the overplus price. The question in the cause, therefore, was, whether the claim made by the agent of the consignor was a legal stoppage of the goods *in transitu*, before they had come to the possession of the consignee; and *Ld. Kenyon*, before whom the cause was tried, held it to be so, and the plaintiffs failed in their suit.<sup>b</sup> This doctrine was recognised and adopted by a late learned Chief Justice of the Court of K. B. in a subsequent case relating to wine sent to the King's warehouse under this statute, which will be more fully stated for another purpose in a subsequent part of this chapter. In these last cases the claim was made before the time arrived at which the consignee had a right to take actual possession. In the case of the goods brought by the waggon to the inn, that time was arrived: the exercise of the right was alone prevented by an extrinsic circumstance wholly unconnected with the conveyance or delivery of the goods. Where the master had begun to unload, and had actually delivered *part* of a cargo of grain, a bill of exchange having been drawn and accepted for the whole, it was determined that the consignor's right to countermand was wholly at an end, and could not be exercised over the residue of the cargo.<sup>c</sup> And where the master had actually delivered the goods to the person by whom they were ordered, and at whose risk they were to be imported, it was held that the consignor could not reclaim them, although the bill of lading was for delivery to the consignor, and was unindorsed, and the bill of exchange drawn for the price had been dishonoured.<sup>d</sup>

<sup>a</sup> 26 Geo. 3, c. 59, s. 4.

<sup>b</sup> *Northey v. Field*, 2 Esp. 613.

<sup>c</sup> *Slabey v. Heyward*, 2 H. Bl. 504. Whether a delivery of *part* operates as a delivery of the *whole* depends in every case upon this, did the parties intend that it should? *Bunney v. Poyntz*, 4 B.

& Ad. 570; *Dixon v. Yates*, 5 Ib. 336; *Jones v. Jones*, 8 M. & W. 442; *Whitehead v. Anderson*, 9 Ib. 535. It has been said that a delivery of *part prima facie* imports a delivery of the whole, *Betts v. Gibbins*, 2 Ad. & E. 73.

<sup>d</sup> *Coxe v. Harden*, 4 East, 211.

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In this last case the propriety of the delivery as between the consignor and the master seems doubtful. Goods are frequently sold upon credit while they remain in the custody of a warehouseman, who is to deliver them to the buyer upon receiving an order for that purpose from the seller. In such cases, the custody of the warehouseman has been sometimes considered as in the nature of a transit; and questions have arisen as to the power of the seller to countermand an order that may have been received by the warehouseman, upon discovering the insolvency of the buyer. Upon such a question, it is important to ascertain whether, according to the nature and subject-matter of the contract, any other act on the part of the seller is to precede the actual delivery of the goods. If nothing is to precede it, and the order has been handed by the buyer to the warehouseman, and he has made the usual entry in his books changing the name of the proprietor, or even if he has not made such entry, the handing the order to the warehouseman is a constructive taking possession by the buyer, and the order cannot be countermanded.<sup>a</sup> *A fortiori*, it cannot be countermanded, if the buyer has actually removed from the warehouse a part of an entire quantity of goods sold at one fixed and entire price.<sup>b</sup> But if anything is to be previously done on the part of the seller to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale, an order for delivery may be countermanded before such previous act has been done. Thus where a person contracted to sell all his starch then lying at the warehouse of another, at a certain price per hundredweight, to be paid for by a bill of exchange, and a certain number of days was allowed for the delivery, and the seller wrote an order to the warehouseman to weigh and deliver all his starch to the buyer, and the buyer handed the order to the warehouseman, who weighed a part which the buyer removed, and then the buyer failed before the residue was weighed, it was held that the seller might lawfully countermand the delivery of the residue.<sup>c</sup> So where a quantity of oil in casks was sold, and according to the course of trade, the casks were to be searched by the seller's cooper, the quantity of impure matter to be ascertained by a person attending on behalf of both parties, and the casks to be filled up at the seller's expense, it was held that the order, which had been delivered to the warehouseman, might be countermanded before these things were done.<sup>d</sup> On the other hand, upon a sale of ten tons of oil, being part of forty tons contained in one cistern, where nothing remained to be done except to draw off the ten from the forty, it was determined that the seller could not countermand the order after it had been placed in the hands of the warehouseman.<sup>e</sup>

By what  
acts right  
taken away.

Lastly, we are to consider by what acts the right of the consignor may be taken away, before the end of the transit. The bill of lading in all its usual forms contains the word "assigns," but

<sup>a</sup> Harman v. Anderson, 2 Camp. 243.  
As to *constructive* possession, see Wentworth v. Outhwaite, 10 M. & W. 450, and cases *ante*, p. 177.

<sup>b</sup> Hammond v. Anderson, 1 N. R. 69.

<sup>c</sup> Hanson v. Meyer, 6 East, 614.

<sup>d</sup> Wallace v. Breeds, 13 East, 522.

<sup>e</sup> Whitehouse v. Frost, 12 East, 614; Dixon v. Yates, 5 Ad. & E. 336.

it will be proper to advert again to the different forms in common use. Sometimes it is made for delivery to the consignor by name, or assigns; sometimes to order, or assigns, not naming any person; and at other times to the consignee by name, or assigns. In the two first cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person, or indorses it specially for delivery to a person named by the indorsement. Occasionally too, particular conditions or restrictions respecting the delivery are mentioned in the indorsement.<sup>a</sup> It will be immediately perceived that, in this respect, there is a *strong resemblance between this instrument and a promissory note*.<sup>b</sup> The mere possession of a promissory note made payable to another person and not indorsed by him, gives the holder no power to indorse over the note. Nor ought the mere possession of a bill of lading, made for delivery to the consignor, and not indorsed by him, induce any one to believe that the holder is authorised to dispose of the goods. On the other hand, if the bill of lading be originally made for delivery to the consignee; or, being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a third person by name, or generally without designating any person, it may, on the first view, be thought that the person named in these two first cases, or who is the holder of the instrument in the latter case, has authority to dispose of the goods, as he may think proper.

Effect of indorsement of bill of lading.

In what follows, the word *consignee* will be used to denote such a person, and the bill of lading spoken of is to be understood as falling within one of these three descriptions last mentioned, unless the contrary is pointed out.

In point of practice it frequently happens that the consignee, having received the bill of lading, sells the goods for a valuable consideration, or raises money upon them, before their arrival, and delivers over the bill of lading to a third person, who is wholly ignorant of the nature or terms of the consignment, and does not know that the consignee is not absolutely entitled to receive and dispose of them: under such circumstances, a very important question of law has arisen upon the right of the consignor to countermand the delivery as between him and the person to whom the bill of lading has been thus delivered, without any fraud or collusion. Of the frequency of the practice to assign bills of lading among merchants, and the convenience of the practice in many cases, there is no doubt; but not every mercantile practice of frequent use and even of general convenience, is, or ought to become, in all its consequences, a part of the law of the land; for if such a rule were adopted, the law must in many cases depart from its own principles, and vary with the varying fashions of the times; nevertheless the law of England does adopt into its own bosom many of the ancient customs and usages of merchants, and stretch forth its arm to assert and maintain them, when they are found consonant to legal reason and legal wisdom, and most especially when they are calculated to promote

<sup>a</sup> *Ante*, p. 177.

N. C. 523.

<sup>b</sup> See *Jenkyns v. Usborne*, 8 Sc.



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honesty and to prevent fraud. And, upon the subject now under consideration, the question is, what extent of *legal*<sup>a</sup> right the act of the consignee confers upon his assignee.<sup>b</sup> This was brought before the Court of K. B. for decision, as the point and hinge of the cause of *Eichbarrow v. Mason*,<sup>c</sup> in which case it appeared that Messrs. T. & Co. had shipped goods at M. for L., by the order of one F. of R., and drawn bills of exchange upon him for the price, and taken from the master three bills of lading for delivery of the goods to order or assigns, two of which they indorsed in blank, and transmitted them, together with an invoice, to F. at R., who sent them and the invoice to the plaintiffs at L. in the same state in which he received them that they might receive and sell the goods on his account, and drew bills of exchange upon them to nearly the amount. F. and the plaintiffs accepted the bills of exchange drawn upon them respectively; but between the ship's departure and her arrival at L., F. became a bankrupt and absconded, and T. & Co. sent another of the bills of lading to the defendants, indorsed specially for delivery to them; and they thereupon obtained the goods from the master. T. & Co. afterwards paid the bills of exchange drawn by them upon F., and the plaintiffs paid those which had been drawn upon them by F. The Court, after solemn argument and deliberation, held that by an assignment made by the consignee for a valuable consideration, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee, and that the consignor was by such assignment deprived of the right to stop the goods *in transitu*, which as against the original consignee he might have exercised. From this decision an appeal was made by writ of error to the judges of the Courts of C. P. and Exch.,<sup>d</sup> who reversed the judgment of the Court of K. B., holding that the assignment gave to the assignee no other right or title than that which the consignee himself possessed, and consequently that the consignor had a right to stop the goods, and prevent their delivery to the assignee. This judgment was by a second writ of error brought before the House of Lords; but their Lordships, thinking the facts of the case were not laid before them in such a manner as to warrant a decision of the point of law, directed the cause to be tried again by a jury in order to remedy that defect. It was accordingly tried again, and the Court of K. B. (at the head of which Ld. Kenyon had in the meantime been placed, and who had in another cause<sup>e</sup> expressed his approbation of the first judgment in this case, as being founded upon principles of policy and common honesty), again decided the case without argument in conformity to the first decision of that Court; and in order that the

<sup>a</sup> The negotiating the bill of lading, by way of pledge, defeats only the *legal* right; *in re Westzinthus*, 5 B. & Ad. 817.

<sup>b</sup> According to Emerigon, the unpaid seller was not, by the ord. of Louis XIV., affected by a transfer of the bill of lading, tom. 1, p. 319; and see 6 Rob. A. R. 325; *Code Civil*, liv. 3. tit. 6.

<sup>c</sup> 2 T. R. 63. The facts appear upon the plaintiff's evidence, to which the defendants demurred. See the very learned opinion delivered by Mr. J. Buller in the House of Lords, 6 East, 21, n.; 1 Smith's L. C. 388.

<sup>d</sup> 1 H. Bl. 357.

<sup>e</sup> *Salomons v. Nissen*, 2 T. R. 674.

question might again be carried to the other tribunals,\* another writ of error was brought, but it was afterwards abandoned; and it is now the admitted doctrine in our courts, that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor. At the second trial of this cause it was the opinion of the jury, and was stated to be so in the verdict, that by the custom of merchants bills of lading expressing goods to have been shipped by any person to be delivered to order or assigns, are, before the ship's arrival, negotiable and transferable by him to any other person by his indorsing his name, and delivering or transmitting the same so indorsed to such other person; and that by such indorsement, delivery, and transmission to such other person, the property is transferred to such other person. And evidence to the same effect was given at a trial in a subsequent case.<sup>b</sup> Nor is the validity of an assignment confined to those cases in which the assignee has no notice that the goods have not been actually paid for in money. If the assignee takes the assignment *bonâ fide* without notice of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title against the consignor. Goods sold are seldom actually paid for in money at the time of their shipment: in general, a bill of exchange is drawn for the price. If a person, knowing that such is the transaction, and that the bill of exchange has been accepted, takes an assignment of the bill of lading fairly and honestly for a valuable consideration, before the money becomes payable, without any reason to know or apprehend that the consignee is likely to fail and not to pay the money in due course, the consignor cannot prevent the delivery of the goods. This has been solemnly decided in the Court of K. B. But if a person assists in contravening the actual terms of the sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith; if, for instance, he knows that the consignee is in insolvent circumstances; that no bill has been accepted for the price, or that being accepted it is not likely to be paid; he will stand in the same situation with the consignee, and his interposition under such circumstances, being in fraud of this right of the consignor, will not be available to defeat it.<sup>c</sup> So if he intervenes after the purchase, and makes himself a partner in the transaction with the first buyer, and engages as between them two to pay for the goods, he cannot prevent the exercise of this right, although he may previously have accepted bills drawn upon him by the buyer to a great part of the amount of the price.<sup>d</sup> But it must not be understood that the consignee can in all cases by his subsequent indorsement, or delivery of the bill of lading to a third person, for a valuable consideration, and without fraud, defeat the right of the consignor to stop the goods. The nature and object of the consignment, and the character of the consignee, must be attended to. If the goods be sent to the consignee as a purchaser, he may either sell or pledge them before

\* 5 T. R. 683.

<sup>b</sup> Haille v. Smith, 1 B. & P. 563.

<sup>c</sup> Cuming v. Brown, 9 East, 506.

<sup>d</sup> Salomons v. Nissen, 2 T. R. 674.

Abbott on Shipping. their arrival, and if the bill of lading has by its form required and received the indorsement of the consignor, a second indorsement by the consignee is not necessary to perfect the transaction between him and the third person. This will appear by attending to the facts of the case of *Lickbarrow v. Mason*. F., the consignee, was a purchaser from T. & Co., the consignors; F. did not sell the goods to Lickbarrow & Co. the plaintiffs, but authorised them to receive the goods, and sell them on *his* account, obtaining from them their acceptance of his bills of exchange on the credit of the bills of lading, and the expectation that they might repay themselves out of the proceeds of the goods. The bills of lading were for delivery to order or assigns, were indorsed generally by T. & Co. the consignors, and were not again indorsed by F. the consignee.

On the other hand, if the goods be sent to the consignee as a factor, and he indorse or deliver the bill of lading, the right will or will not be defeated, according as the facts may bear on the Factors' Acts.<sup>a</sup> By this Act, the person *entrusted* with, and in possession of a bill of lading, any of the warrants, certificates, or orders mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the *sale* or disposition of the goods, or the *deposit* or *pledge* thereof, if the buyer, disponent, or pawnee, *has not notice* that such person is not the actual and *bonâ fide* owner of the goods. If the deposit or pledge be for a pre-existing debt or demand, the person so taking is in the factor's shoes. Again, any person may contract for the *purchase* of goods with an agent entrusted with them, or to whom they may be consigned, and pay him for them, *notwithstanding notice of agency*, if the thing be done in the usual course of business, and the buyer had not at the time of the contract or payment notice that the agent was not authorised to sell or to recover the price. Any one may accept any goods, or any of the above named documents, on deposit or pledge from a factor or agent, *notwithstanding notice*; but the pledgee acquires no other right than the factor had.

The indorsement of a bill of lading is not properly an actual transfer in itself of the goods therein mentioned, but is rather to be considered as evidence, or as an act raising a presumption, of such a transfer; and consequently the object and legal effect of the indorsement may be ascertained by other circumstances. Therefore, where a bill of lading was indorsed and transmitted by the consignor to an agent, without valuable consideration, to enable him to receive the goods therein mentioned for the use of the consignor, in case the consignee should fail; it was doubted whether the agent could maintain an action at law for the goods in his own name. The Court appeared inclined to think that he could not, but the cause in which the point arose was decided on another ground.<sup>b</sup> And as, on the one hand, the indorsement or delivery of the bill of

<sup>a</sup> 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; see *Phillips v. Huth*, 6 M. & W. 572; *Hatfield v. Phillips*, 9 Ib. 651; *Bonzi v. Stewart*, 5 Sc. N. C. 31; *Phillips v.*

*Irving*, 8 Ib. 7.

<sup>b</sup> *Coxe v. Harden*, 4 East, 211; *Mitchel v. Ede*, 11 Ad. & E. 888; and see *Phillips v. Irving*, *suprà*.

lading by the consignor does not necessarily enable the consignee CH. XVIII. to divest the consignor's right of stopping *in transitu*, so, on the other hand, there may be circumstances equivalent to such indorsement and delivery, which may enable the consignee to do this. As where T. & Co. sent goods from I. to L., to be sold by E. & H., their factors there, and wrote to them to insure the goods, and sent them a bill of lading not indorsed, but having the names of E. & H. on the back, and being applied to by them for an indorsement, answered by letter that if the bill of lading was not indorsed, it was a mistake, and they would send an indorsement; upon which E. & H. sold the goods; and it afterwards happening that they were unable to pay bills drawn upon them by T. & Co. on the general account, one D. paid those bills for the honour of the drawers, and knowing all these transactions applied to them for an indorsement of the bill of lading, which they sent him; and D. thereupon demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of E. & H.; upon this, D. brought an action against the master, which was tried before Ld. Kenyon, and his lordship ruled that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of E. & H.; E. & H. being factors authorised to transfer the property in them, and having actually done so.\*

In the case last quoted there were special facts, which were considered as *equivalent to an indorsement of the bill of lading by the consignor*. But if there be no such facts, and the bill be for delivery to order or assigns, and transmitted unindorsed, the holder thereof cannot, by an attempt to transfer the property of the goods to a third person, divest the right of the consignee to stop them *in transitu*. This will appear by the following case. One F., a wine-merchant at L., having ordered five pipes of wine from Messrs. A. and Co. of O., they loaded them on board a vessel bound for L., and took from the master bills of lading for delivery to order or assigns. One of these bills they transmitted to F. in a letter, wherein they said they had shipped the wine on his account, had sent him a bill of lading, and drawn upon him for the price. F. accepted the bill of exchange thus drawn upon him, which was payable nine months after date. Before the bill of exchange became due, the wine arrived, and F. not being able to pay the duties, it was sent to the King's warehouse, under the statute 26 Geo. 3, c. 59; while it remained there, F. being indebted to one M. N., and called upon for payment, and unable to pay, sold the wine to her for 40*l.* then paid to him, and the amount of his debt. He became bankrupt soon afterwards; and the agents of the consignors having paid the duties and obtained the goods, M. N. brought an action against them for the value. The cause was tried before Ld. Ellenborough; and it was insisted, on behalf of the plaintiff, that there was no difference between the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his lordship

\* Dick v. Lumsden, Peake's N. P. 189. It is difficult to discover a state of facts amounting to an equivalent to

an indorsement of the bill of lading. See Jenkyns v. Usborne, 8 Sc. N. C. 523.

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declared himself to be of a different opinion, and held that the right of the consignor to stop the goods was not divested under these circumstances.<sup>a</sup>

By the ord. of Louis XIV.<sup>b</sup> the right of the vendor, or of the person who has advanced money at respondentia on the specific security of goods, cannot be divested by an assignment of the invoice or of the bill of lading; Emerigon and Valin agree upon this point, although they differ as to the effect of such an assignment upon the right of the general creditors of the assignor. By the *Code Civil* (art. 1583) the property passes by the contract *per se*. In the *Codes Français Annotés*, under the head *Du Connaissance*, it is said: "Les connaissements revêtus d'endossements réguliers prouvent la propriété des marchandises chargées, non seulement entre le capitaine et les chargeurs, mais encore à l'égard des tiers; il en est des connaissements et endossements dans le commerce maritime comme des lettres des voiture, des lettres de change," &c.

Indorse-  
ment to  
several  
persons.

But, in cases of this nature, an important and difficult question of fact may arise upon the fairness and honesty of the assignment; and even as between the consignor and the original consignee the right to stop the goods may be doubtful in the particular circumstances of the case; and it would be a great hardship upon the owners and masters of ships, if they were obliged to exercise a judgment upon these doubtful matters of fact, and to decide upon them, and deliver the goods at their own peril, but I apprehend the law does not altogether cast this burden upon them. In the case of *Caldwell v. Ball*<sup>c</sup> it was held that the master had discharged himself by delivering the goods to the person to whom the consignor first indorsed the bill of lading; but in that case the question arose between two consignees, to each of whom a bill of lading had been indorsed, and there had been no countermand or attempt to stop *in transitu*, and the master happened to know the priority of indorsement, which was substantially to the owners of the ship, whereas it may often be out of the power of the master to inform himself satisfactorily of the priority of indorsement. In an earlier case, which was tried before Ch. Just. Lee at Guildhall, and which was an action brought by the assignee of the original consignee against the master, who had delivered the goods to the person to whom the consignor had sent another bill of lading as a security, and to enable him to take possession of the goods on his behalf, if the consignee should fail, which had been the case; it appeared in evidence by the testimony of merchants and masters of ships, that, by usage, *in the case of indorsement of bills of lading to different persons*, the master was at liberty to deliver to whichever he thought proper; and upon that ground, the Ch. Just. directed the jury to find their verdict in favour of the defendant, and they accordingly did so.<sup>d</sup> But perhaps this rule might, upon further consideration, be held to put too much power into the master's hands, and it might in some cases be inconsistent with the acknowledged right to stop *in*

<sup>a</sup> *Nix v. Olive*, Sit. at Guild. before Lord Ellenborough after T. T. 1805.

<sup>b</sup> Valin, liv. 2, tit. 10, art. 3; Eme-

rigon, tom. 1, p. 319.

<sup>c</sup> 1 T. R. 205.

<sup>d</sup> *Fearon v. Bowers*, 1 H. Bl. 364, n.

*transit*, and defeat the beneficial exercise of it. And it may be CH. XIX. collected from a decision of the Court of C. P.,<sup>a</sup> that if the master being required to deliver the goods to an agent of the consignor, either expressly engage to do so, or say that he will not part with them, until he is certain of a safe delivery, and afterwards deliver them to the consignee or the persons claiming under him, he will be responsible to the consignor, provided it shall turn out that the consignor was legally entitled to countermand the delivery and take back the goods.

In general, where two opposite parties claim a right to receive the goods, both or either of them will be willing to give an indemnity to the master; and the master should in prudence deliver the goods to the party upon whose indemnity he can most safely rely. But if a satisfactory indemnity is not offered, and the master must exercise a discretion, then if the bill of lading has not been assigned over by the consignee, and he has failed, without doubt the master should deliver to the person who claims for the use of the consignor. If the consignor has indorsed bills of lading to different persons, as was the case in *Caldwell v. Ball*, the master should deliver to the person to whom the consignor first made the indorsement.<sup>b</sup> If the consignee has assigned the bill of lading, and the validity of the assignment be questionable, it seems most proper for the master to deposit the goods in a place of safety, and apply to the Court of Chancery by way of *interpleader*, to compel the contending parties to litigate their rights by an action between themselves.<sup>c</sup>

## CHAPTER XIX.

### SALVAGE.<sup>d</sup>

HAVING thus treated of the rights and duties arising out of the contracts between the shipowner and merchant, it seems proper in the next place to consider a subject, which the dangers of navigation frequently render interesting to both alike, viz. the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of *Salvage*, and at present is commonly made by a payment in money, but in the

What.

<sup>a</sup> *Mills v. Ball*, 2 B. & P. 457. The defendant was a wharfinger; but the doctrine applies equally to the case of a master.

<sup>b</sup> See the three cases in 1 Emerigon, 317, 318, quoted by Sir Wm. Scott, in

the case of the *Constantia*, 6 Rob. 328.

<sup>c</sup> Or, obtain an Interpleader Order, 1 & 2 Wm. 4, c. 58.

<sup>d</sup> See Park on Ins. tit. Salvage, ante, p. 49.

*Abbott on Shipping.* infancy of commerce was more frequently made by the delivery of some portion of the specific articles saved or recovered. A reward of this kind is for the benefit actually conferred in the preservation of life or property; mere attempts, or exertions, however meritorious, give no right to it.<sup>a</sup> Before the 9 & 10 Vict. c. 99, s. 19, it was not payable for saving life. The two main ingredients in salvage service are, 1st, the danger to which life or property is exposed; 2nd, the danger encountered by the salvors in the rescue. Upon these two particulars mainly depends the measure of compensation.<sup>b</sup> A service originally of towage under an agreement may, by circumstances, be converted into one of salvage.<sup>c</sup> The officers and crews of H. M.'s ships are entitled to salvage remuneration upon the same footing as other salvors.<sup>d</sup> In *Newman v. Walters*, a passenger recovered.<sup>e</sup> A custom against it is good in law.<sup>f</sup>

To whom payable. All foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, or the circumstances of the case. But it is obvious that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled than the degrees of labour experienced on the ocean, or the degrees of peril to which persons who engage in the meritorious task of assisting the distressed on that element, are at different times exposed? and, therefore, in the case of wreck or derelict at sea,<sup>g</sup> the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only, as a general principle, that a reasonable compensation shall be made. The legislators of all civilised and commercial states in modern times<sup>h</sup> have laboured earnestly to repress, by due severity of punishment, the barbarous spirit of plundering the helpless and distressed mariner, whose situation calls for assistance and relief. And very salutary provisions have been made on this subject by the wisdom of our own parliaments, but which I shall forbear to repeat.<sup>i</sup> A person, who by his own labour preserves goods, which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of England<sup>k</sup> to retain the possession of the goods saved, until a proper compensation is made to him for his trouble. This compensation, if

Amount of.

<sup>a</sup> The *Zephyrus*, 1 Wm. Rob. 329; and see the *Westminster*, 1b. 229.

<sup>b</sup> The *D. of Manchester*, 2 W. Rob. 475.

<sup>c</sup> *Wm. Brandt*, 2 Thornt. Supp. 67; and see the *Betsey*, 2 Wm. Rob. 167; the *Hebe*, 1b. 250.

<sup>d</sup> The *Wilsons*, 1 Wm. Rob. 172; see 16 & 17 Vict. c. 131, s. 40; and *post*, p. 255.

<sup>e</sup> 3 B. & P. 612.

<sup>f</sup> *Harriott*, 1 Wm. Rob. 489.

<sup>g</sup> In the case of derelict become the property of the Crown, it was formerly

the settled practice of the Court of Admiralty to give a moiety to the finders or salvors, but the practice has been long disused, and the reward become discretionary. Case of the *Aquila*, 1 Rob. A. R. 37; *Wellwood's Sea Laws*, tit. 24.

<sup>h</sup> I have used the words "in modern times" because formerly the claim of the sovereign power in some countries was not less barbarous than the temper of the inhabitants. See *Valin's pref.* to tit. 9, of b. 4, of the *Fr. Ord.*

<sup>i</sup> 9 & 10 Vict. c. 99; see *ante*, p. 50.

<sup>k</sup> *Hartfort v. Jones*, 1 Ld. Raym. 393.

the parties cannot agree upon it, may by the same law be ascertained by a jury in an action brought by the salvor against the proprietor of the goods; or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action against the salvor; and if the jury think the sum tendered sufficient, he will recover his goods or their value, and the costs of his suit. The Court of Admiralty will fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit; or, if a sale be necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason. And, in fixing the *rate* of salvage, this Court<sup>a</sup> usually has regard not only to the labour and peril incurred by the salvors, but also to the promptitude and alacrity manifested by them, and to the value of the ship and cargo saved, as well as the degree of danger from which they were rescued.<sup>b</sup> The Court regards, likewise, the salvor's *capacity* to perform the task undertaken. In ordinary cases the possession of ordinary skill and ability is all that is expected from persons attempting to perform such duties; but those not possessed of adequate knowledge have a claim to indulgence only when more efficient persons are not on the spot.<sup>c</sup> Be it remembered, however, that they may be curtailed, or even deprived altogether of the salvage remuneration, because of error, misconduct, want of skill, and capacity in the performance of the service. Even when essential service has been rendered to a vessel, the subsequent misconduct of the salvors may not only diminish the amount of reward, but may cause the forfeiture of their entire claim.<sup>d</sup> I have said that the Admiralty Court has regard to the value of the ship or cargo saved. The usage of this Court is, except as regards bullion, to take the whole value of the ship and cargo, and assess the amount of remuneration upon the whole; each paying its due proportion.<sup>e</sup> In the apportionment of it, the Court is not influenced by the fact of the vessel's being insured.<sup>f</sup>

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Court.

When a well-founded claim of salvage has been entered in the Court of Admiralty, the proper course to be pursued by the defendants, in order to save the expense of further proceedings, is to tender, in the first stage of the cause, by *acts of Court*, and not personally and verbally to the claimants, a specific sum for the salvage, accompanied by an offer to pay the costs incurred. The Court will then consider of the sufficiency of the sum tendered, and if it shall be thought sufficient, will make the party, who refuses the offer, liable not only to his own costs, but also to the costs of the other side, if it shall appear that the proceedings have been vexatiously pursued.<sup>g</sup> In all salvage cases, the Admiralty Court has power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied.<sup>h</sup> In all salvage cases protests ought to be brought

<sup>a</sup> The *William Beckford* at the delegates, 17th and 24th Nov. 1801; 3 Rob. A. R. 355.

<sup>b</sup> The *Cape Packet*, 3 Wm. Rob. 122.

<sup>c</sup> *Dydden*, 1 Thornt. 116.

<sup>d</sup> La *Constancia*, 1b. 475; 2 W. Rob. 487.

<sup>e</sup> The *Emma*, 2 Wm. Rob. 315.

<sup>f</sup> The *Deveron*, 1 Ib. 180.

<sup>g</sup> The *Vrouw Margaretha*, 4 Rob. A. R. 103; *vide* *Tindall v. Bell*, 11 M. & W. 232; *Windsor Castle*, 2 Thornt. Sup. 16; *Persian*, 1 Wm. Rob. 327.

<sup>h</sup> The *Tremont*, 1 Wm. Rob. 164.



*Abbott on Shipping.* in.<sup>a</sup> In the case of valuable property, and numerous proprietors and salvors, the jurisdiction and proceedings of this Court are admirably adapted to the purposes of justice.<sup>b</sup> But as the delay and expense necessarily incident to the proceedings of a high tribunal, sitting at a distance from the subject in contest, will often be injurious to the parties, the Legislature has endeavoured to introduce a *more expeditious and less expensive mode of adjustment*. For this purpose several provisions have been at different times made by the Legislature. But the *Wreck and Salvage Consolidation Act* (9 & 10 Vict. c. 99) is the one that now mainly regulates the matter. It gives the High Court of Admiralty jurisdiction to decide upon all *salvage claims*, whether on sea or land, except in cases of goods thereinbefore directed to be sold as Droits of Admiralty. In case of damage done by a foreign vessel, a judge may order its arrest, unless owner undertake to appear in an action. If owners and salvors disagree respecting salvage, two justices, or a person nominated by them, may determine the same. The Admiralty may appoint *Salvage Commissioners* to determine differences where they think fit, with power to examine on oath. If the parties are dissatisfied with the award of the justices, or of the person nominated by them, they may appeal to the Court of Admiralty, and the goods, &c., are to be restored to owners on giving bail. If owner refuse to comply with the terms of such award, or neglect to appear, the receiver may proceed to a *sale*. Whenever any sum to be paid for any such services, either voluntarily or in consequence of any agreement, or of any arbitration, or of any award by any such justices, or by the Salvage Commissioners, or within the jurisdiction of the *Cinque Ports*, by any commissioners, shall be distributable between two or more persons, such sum shall be paid to the person nominated by such justices, &c., in and by their award, and such person must within three days proceed to make the allotment. This payment to the appointee precludes the claimant from enforcing his claim against the ship, &c., and owners. Serjeants and deputy-serjeants of the *Cinque Ports* have the same powers, and are liable to the same duties as receivers.

Where service is performed by H. M.'s ships.<sup>d</sup>

I have stated in a former part of this chapter that the officers and crews of H. M.'s ships are equally entitled to salvage remuneration.<sup>c</sup> When such services are rendered, no claim can be made for any loss, damage, or risk thereby caused to such ship, or to her stores, tackle, or furniture, or for the use of any stores or other articles belonging to H. M. supplied in order to effect the salvage service, or for any other expense or loss sustained by H. M., by reason of such services. The steps to be taken when salvage services have been rendered by H. M.'s ships abroad are these:—the property alleged to be salvaged shall, if the salvor is justified by the circumstances of the case in detaining it at all, be taken to some port where there is either a consular officer or a vice-Admiralty Court; and within 24 hours

<sup>a</sup> The *Emma*, 2 Wm. Rob. 319.

<sup>b</sup> See a feigned issue under 3 & 4 Vict. c. 65 out of this Court to try the existence of a *custom* to be free from sal-

vage, *Harriott*, 1 Wm. Rob. 439.

<sup>c</sup> P. 252.

<sup>d</sup> 16 & 17 Vict. c. 131, s. 40-51.

after arriving at such port, the salvor and the master, or other person in charge of the property alleged to be saved, shall each deliver to the consular officer or vice-admiralty judge there a statement verified on oath, specifying, so far as they respectively can, and so far as the particulars required apply to the case, the place, condition, and circumstances in which the said ship, cargo, or property was at the time when the services were rendered for which salvage is claimed; the nature and duration of the services rendered. And the salvor shall add to his statement, the proportion of the value of the said ship, cargo, and property, and of the freight which he claims for salvage, or the values at which he estimates the said ship, freight, cargo, and property respectively, and the several amounts that he claims for salvage in respect of the same; and any other circumstances he thinks relevant to the said claim. And the said master or other person in charge of the said ship, cargo, or property, shall add to his statement a copy of the certificate of registry of the said ship, and of the indorsements thereon, stating any change which (to his knowledge or belief) has occurred in the particulars contained in such certificate; the name and place of business, or residence, of the freighter (if any) of the said ship, and the freight to be paid for the voyage she is then on; a general account of the quantity and nature of the cargo at the time the salvage services were rendered; the name and place of business, or residence, of the owner of such cargo, and the consignee thereof; the values at which the said master estimates the said ship, cargo, and property, and the freight respectively, or, if he thinks fit, in lieu of such estimated value of the cargo, a copy of the ship's manifest; the amounts which the master thinks should be paid as salvage for the services rendered; an accurate list of the property saved, in cases where the ship is not saved; an account of the proceeds of the sale of the said ship, cargo, or property, in cases where the same or any of them are sold at such port as aforesaid; the number, capacities, and condition of the crew of the said ship at the time the said services were rendered; any other circumstances he thinks relevant to the matters in question; a statement of his willingness to execute the prescribed bond, to answer the demand in such amount as the said consular officer or vice-admiralty judge shall fix; and upon such master or other person executing the bond, in the presence of the said consul or judge (who shall attest the same), and delivering the same to the salvor, the right of the salvor to detain or retain possession of the said ship, cargo, or property, or any of them, in respect of the said salvage claim, shall cease. If the ship, cargo, or property in respect of which the claim for salvage is made, is not owned by persons domiciled in H. M.'s dominions, the right of the salvor to detain or retain possession thereof shall not cease unless the master or other person in charge thereof procures, in addition to the said bond, such security for the due performance of the conditions thereof, as the officer or judge considers sufficient for the purpose, and places the same in the possession or custody of the officer or judge, or, if the salvor so desires, in the possession or custody of the officer or judge jointly with any other person whom the said salvor may appoint for the purpose.

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The consular officer or judge shall, at the earliest opportunity, transmit the statements and documents, and a notice of the sum he has fixed, to the High Court of Admiralty of England, or, if the said salvor and the said master or other person in charge agree that the said bond shall be adjudicated on by any vice-Admiralty Court, to such court.

The bond binds the owners of the ship, freight, and cargo, and their heirs, executors, and administrators, for the salvage adjudged to be payable in respect of the said ship, freight, and cargo, respectively.

The bond shall be adjudicated on and enforced by the High Court of Admiralty in England, or, if the said salvor and master or other person at the time of the execution of the said bond agree upon any vice-Admiralty Court, then by such vice-Admiralty Court.

The High Court of Admiralty has power to enforce any bond given in pursuance of this Act in any vice-Admiralty Court in any part of H. M.'s dominions; and all courts in Scotland, Ireland, and the islands of Jersey, Guernsey, Alderney, Sark, and Man, exercising Admiralty jurisdiction, shall, upon application, aid and assist the High Court of Admiralty in enforcing it.

Any such salvor as aforesaid of any ship, cargo, or property, who may elect not to proceed under 16 & 17 Vict. c. 131, shall have no power to detain the said ship, cargo, or property, but may proceed otherwise for the enforcement of his salvage claim as if the Act had not been passed; and nothing in the Act abridges or affects the rights of salvors, except in the cases by it provided for. Voluntary agreements may be made, which shall have the same effect as the bonds above mentioned.

Documents  
free from  
duty.

These bonds, statements, agreements, and other documents, if made or executed out of the U. K., are exempt from stamp-duty.

## CHAPTER XX.

### THE DISSOLUTION OF CONTRACTS FOR THE CARRIAGE OF GOODS IN MERCHANT SHIPS.

HAVING thus considered the several species of contract made for the carriage of goods in merchant ships, and the various duties arising therefrom, I proceed in the last place to the examination of the modes by which contracts of this nature may be dissolved. And these are either the voluntary act of the contracting parties, or some extrinsic matter happening after the making of the contract and before its completion.

It is a general rule, that whatever derives its force and validity CHAP. XX. from the consent of parties, may, by the mutual consent of the same General parties, be rendered null and invalid. There is indeed a technical rules. rule of the law of England, which requires the discharge of a person from a contract to be made by an instrument of as high a nature as the original instrument of contract: and this rule is applicable to the contract of affreightment by charter-party *under seal*; <sup>a</sup> but in case of a discharge by mutual consent, not expressed in this formal manner, the rule would at the utmost have no other effect than to render it necessary for the party to apply to a court of equity. In all such cases, ~~however~~, prudence requires that the deed should be cancelled and delivered up. But a merchant, who has laden goods, cannot insist upon having them relanded, and delivered to him without paying the freight, that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him. <sup>b</sup> Indeed a master, who has signed bills of lading, cannot with prudence deliver back the goods without having all the parts of the bill of lading delivered up to him; for if any one part has been transmitted to a third person, such third person may have acquired an interest in the goods. Another general rule of law furnishes a dissolution of these contracts by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, <sup>c</sup> the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement, and before the completion of the voyage, although a different rule is laid down in this case by the French Ordinance (of 1681) as I have before observed. <sup>d</sup> But if war or hostilities break out between the place to which the ship or cargo belongs, and any other nation to which they are not destined; although the performance of the contract is thereby rendered more hazardous, yet is not the contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure. So, if the government of the country to which the ship and cargo belong, should prohibit the exportation of the particular commodities that compose the cargo, or by the terms of the contract are destined to compose it (as is sometimes done by all states with regard to provisions in time of scarcity), in this case also it seems that the law of the country would give no damages to the owner against the merchant, who had been thus

<sup>a</sup> See also as to a contract *not under seal*, under the statute of frauds, and at common law, dissolved or altered *before* breach, *Goss v. Nugent*, 2 B. & Ad. 58; *Stead v. Dawber*, 10 A. & E. 57.

<sup>b</sup> 2 Eq. Ca. Ab. p. 98, *Anon.*

<sup>c</sup> *Code de Commerce*, art. 276.

<sup>d</sup> Liv. 3, tit. 3; *Fret*, art. 15; and see *Code de Commerce*, art. 277.

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compelled by the law of the same country to abandon his engagement.<sup>a</sup> On the other hand, if a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles, neither dissolves the contract, nor absolutely excuses a non-performance of it;<sup>b</sup> for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own; and the different interests of nations sometimes render an act meritorious in one, which is prohibited by another in alliance with it, if the act be not contrary to the general law of nations, or to existing treaties; and the common exception of the restraint of princes and rulers applies only to the case of the master.<sup>c</sup> But in such a case it would be the duty of the master, upon his arrival at the port of lading, to obtain another cargo, if possible, from other persons, and not sullenly hoist sail and depart, in order to charge the merchant with the whole freight. And if, upon the ship's arrival, he is informed that the merchant is unable to furnish the lading, he cannot, by waiting the time appointed in the charter-party, charge the merchant with the demurrage.<sup>d</sup>

## Embargo.

But although contracts of this nature are dissolved by the breaking out of war or hostilities in the manner before mentioned, of which no person can foresee the termination; yet they are not dissolved by an *embargo*, or temporary restraint of their performance imposed by the government of the country in whose ports the vessel may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port, or in a place at which the ship may have touched in the course of her voyage.<sup>e</sup> In the case of an embargo, the French Ordinance (of 1681) expressly authorised the merchant to unlade the goods at his own expense, if he thought fit, upon condition to relade them or indemnify the master;<sup>f</sup> and Valin<sup>g</sup> and Pothier<sup>h</sup> declare it to be their opinion, that if the goods are of such a sort, that they will not keep during the period of the embargo, and cannot at its expiration be readily replaced by others of the like kind, the embargo will put an end to the contract. In such a case, whatever the rule of law may be, the interest of all parties will in general induce them to annul the contract upon reasonable terms. But in the case of an embargo imposed by the government of the country of which the merchant

<sup>a</sup> See *Evans v. Hutton*, 5 Sc. N. C. 683.

<sup>b</sup> Said by the Court to have been so decided in Chancery, 2 Vern. 212; and see Dig. 19, 2, 61, 1; Ord. of Rotterdam, art. 130, 131, 132; 2 Mag. 102, and Cleirac, note 4, on the 19th article of the laws of Oleron. And ruled in the case of *Blight v. Page*, Guildh. Sit. after M. T. 1801, before Lord Kenyon, Ch. J. cited 3 B. & P. 298; *Barker v. Hodgson*, 3 M. & S. 267, a case of *pestilence* held not a dissolution; see also *Paradine v. Jane*, Alleyn, 27; *Evans v. Hutton*, 5 Sc. N. C. 685, and cases

cited.

<sup>c</sup> *Blight v. Page*; and see also as to this point, *Touteng v. Hubbard*, 3 B. & P. 298.

<sup>d</sup> *Blight v. Page*.

<sup>e</sup> French Ordinance of 1681, liv. 3, tit. 1; des Chartre-parties, art. 8; and see liv. 3, tit. 3; Fret. art. 16; Pothier, Chartre-partie, num. 100; *Code de Commerce*, art. 277.

<sup>f</sup> Liv. 3, tit. 1; Chartre-parties, art. 9; *Code de Commerce*, art. 278.

<sup>g</sup> Tom. 1, p. 628.

<sup>h</sup> Chartre-partie, num. 102.

is a subject, in the nature of reprisals and partial hostility against the country to which the ship belongs, the merchant may put an end to the contract, if the object of the voyage is likely to be defeated by the delay. CH. XXI.

It is illegal to attempt to enter a blockaded port, in violation of the blockade; and after notification of it, the act of sailing thereto, with the *intention* of violating the blockade, is also in itself illegal; but the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is no offence against the law of nations where there is no premeditated *intention* of breaking the blockade if it shall be found to continue in force when the ship arrives at the port.\* Whether, therefore, the contract be void on the ground of illegality, depends on circumstances. Effect of a blockade.

Whether the exercise of the right of stoppage *in transitu* rescinds the contract or not, is a question that has been frequently raised, but never decided. The better opinion seems to be that it does not. Stoppage in transitu.

## OF THE WAGES OF MERCHANT SEAMEN.

### CHAPTER XXI.

#### OF THE HIRING OF SEAMEN.

SEAMEN employed in merchant ships are usually hired at a certain sum, either by the month, or for the voyage. In the former case, the amount of the payment, to be earned by them, depends upon the length of the voyage; in the latter, it is fixed invariably without any regard to the duration of the voyage. In the fishing trade, particularly the whale-fishery, and in private ships of war, the seamen usually serve under an engagement to receive a certain portion of the profits of the adventure. Such an engagement is rather in the nature of a partnership than of a contract of hiring and service, and the objects of it do not properly fall under my consideration. An engagement to receive a certain part of the freight, to be earned by a merchant ship, which seems formerly to have been not unfrequent, is at present seldom, if ever, made. This last part, therefore, of the present treatise, will be employed in the consideration of contracts made for the employment of seamen by the month or for the voyage; of the earning and payment of wages in pursuance of such contracts: of the loss and forfeiture of wages: and of the modes of enforcing payment by the aid of courts of justice. Each of these topics will form the subject of a distinct chapter.

\* *Medeirs v. Hill*, 8 Bing. 231; *Neptunus*, 2 Rob. 110; the *Shepherdess*, *Naylor v. Taylor*, 9 B. & C. 719; the *5 Rob. 264*.

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Hiring of  
Seamen.

Agreement,  
contents of.

First, as to the hiring of seamen. In order to prevent the mischiefs, that frequently arose from the want of proper proof of the precise terms upon which seamen engaged to perform their service in merchant ships, the Legislature has, from time to time, interfered; and, lastly, by the 13 and 14 Vict. c. 93, ss. 46—55,<sup>a</sup> it is enacted “that every master of a ship shall, on carrying any seaman to sea as one of his crew, enter into an agreement with him in the manner herein-after mentioned; and every *such agreement shall be in a form to be sanctioned and issued by the Board of Trade*, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof:—1. The nature, and, as far as practicable, the length of the voyage or engagement on which the ship is to be employed: 2. The time at which each seaman is to be on board or to begin work: 3. The capacity in which each seaman is to serve: 4. The amount of wages which each seaman is to receive: 5. A scale of the provisions which are to be furnished to each seaman: 6. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt: and shall be so framed as to admit of stipulations, to be adopted at the will of the master and seaman in each case, as to advance and allotment of wages; and may contain any other stipulations which are not contrary to law. That with respect to *foreign-going ships*, every agreement (except in the special cases of agreements made out of the United Kingdom and of agreements with substitutes herein-after mentioned) shall be signed by each seaman in the presence of a shipping master; and such shipping master shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same, before he signs it, and shall attest each signature; and when the crew is first engaged the agreement shall be signed in duplicate; and one part shall be retained by the shipping master, and the other part shall contain a special place or form for the descriptions and signatures of substitutes or persons engaged subsequently to the first departure of the ship, and shall be delivered to the master; and in the special cases of seamen engaged out of the United Kingdom, and of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship’s putting to sea, by death, desertion, or other unforeseen cause, the engagement may, when practicable, be made before some official shipping master duly appointed either in the U. K., or in H. M.’s dominions abroad for the purpose of shipping seamen, and in the manner herein-before specified for ordinary cases happening in the U. K.; and in such special cases whenever the engagement is not so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen, either before some

<sup>a</sup> Partly amended by the 14 & 15 Vict. c. 96, and 16 & 17 Vict. c. 131.

consular officer, or before some officer of customs, or on board the ship; and the seamen shall thereupon sign the same in the presence of such officer, or of some other witness, who shall attest his signature; provided, that nothing in the act contained shall dispense with the sanction for shipping seamen at foreign ports required by the General Merchant Seamen's Act.<sup>a</sup> That with respect to *home trade ships*, crews or single seamen may, if the master thinks fit, be engaged or discharged before a shipping master in the manner herein-before directed with respect to foreign-going ships; and in every case in which the engagement is not so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over, and explained to each seaman, and the seaman shall thereupon sign the same in the presence of a witness, who shall attest his signature.<sup>b</sup> That every erasure, interlineation, or alteration, in any such agreement as aforesaid (except additions so made as herein-before directed for shipping substitutes or persons engaged subsequently to the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested by the written attestation (if made in H. M.'s dominions) of some shipping master, justice, officer of the customs, or other public functionary, or (if made out of H. M.'s dominions) of a consular officer, or, where there is no consular officer, of two respectable *British* merchants.<sup>c</sup> That in respect of foreign-going ships the master shall, before quitting the first port of departure, produce and show to the collector or comptroller of customs the agreement so signed and attested as aforesaid, and no officer of customs shall clear any such ship outwards or permit any such ship to proceed to sea without such production; and the master shall also, within forty-eight hours after the ship's arrival at her final port of destination in the U. K., or upon the discharge of the crew, whichever first happens, deliver such agreement to the shipping master, or, if there is no shipping master, to the collector or comptroller of customs; and the shipping master or officer of customs shall thereupon give to the master a certificate of such delivery; and no officer of customs shall clear inwards any foreign-going ship without the production of such certificate; and in every case in which any such ship is delayed for want of the production of any agreement or certificate of the delivery thereof, the tide-waiters left on board shall be maintained at the expense of the master or owner until the same is produced, and clearance may be delayed till such expense is satisfied.<sup>d</sup> That in the case of home trade ships, no agreement shall extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her final port of destination in the United Kingdom after such date; and the owner or master of every such ship shall, within twenty-one days after the thirtieth day of June and the thirty-first day of December in every year, transmit or deliver to some shipping master or officer of customs in the United Kingdom

Cn. XXI.

Read over,  
signed, &c.

Duration of.

<sup>a</sup> s. 47.<sup>b</sup> s. 48.<sup>c</sup> s. 49.<sup>d</sup> s. 50.



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Evidence.

Lien on ship  
not forfeited  
by it.

every agreement made within the six calendar months next preceding such days respectively; and the shipping master or officer of customs shall thereupon give to the master or owner a certificate of such transmission or delivery; and no officer of customs shall give to the master or owner of any such ship as aforesaid a transire or any other customs document necessary for the conduct thereof without the production of such certificate.<sup>a</sup> That any seaman may bring forward evidence to prove the contents of any agreement or otherwise to support his case without producing or giving notice to produce the agreement or any copy thereof.<sup>b</sup> That no seaman shall by reason of any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation which is inconsistent with any provision of this act or of any other act relating to merchant seamen, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.<sup>c</sup> That the master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement (omitting the signatures) to be placed on board in such a manner as to be accessible to the crew.<sup>d</sup> That if in any case any seaman is carried to sea without entering into any agreement in the form and manner and at the place and time hereby in such case required, or if any agreement or such copy thereof as aforesaid is not delivered or transmitted to a shipping master or officer of customs at the time and in the manner hereby directed, the master in the case of a foreign-going ship, and the master or owner in the case of a home trade ship, shall for each of such offences be liable to a penalty not exceeding five pounds; and if a copy of the agreement is not placed on board in the manner hereinbefore directed, the master shall for such offence be liable to a penalty not exceeding five pounds; and every person who fraudulently alters or procures to be altered, or assists in altering, or makes or procures to be made, or assists in making, any false entry in, or delivers or procures to be delivered or assists in delivering a false copy of, any agreement, for each such offence shall either be deemed guilty of a misdemeanour, or shall be liable summarily to a penalty not exceeding fifty pounds, or to imprisonment not exceeding three months, with or without hard labour, as the justice or court hearing the case may think fit.<sup>e</sup> In the case of foreign-going ships making voyages averaging less than six months in duration, agreements with the crew may be made to extend over two or more voyages in the manner and subject to the conditions herein-after mentioned; (that is to say,) no such agreement shall extend beyond the next following thirtieth of June or thirty-first of December, or the first arrival of the ship at her port of destination in the United Kingdom after such date; and every person entering into such agreement, whether engaged upon the first commencement thereof or otherwise, (except seamen engaged out of the United Kingdom

<sup>a</sup> s. 51.

<sup>b</sup> s. 52.

<sup>c</sup> s. 53.

<sup>d</sup> s. 54.

<sup>e</sup> s. 55.

and such substitutes as herein-after mentioned,) shall enter into and sign the same in the manner required by the said Mercantile Marine Act, 1850, in the case of foreign-going ships; and every person engaged thereunder, if discharged in the United Kingdom, shall be discharged in the manner required by the said act for the discharge of seamen belonging to foreign-going ships; and seamen engaged out of the United Kingdom, and substitutes engaged in the place of seamen who have duly signed this agreement, and whose services are lost within twenty-four hours before the ship puts to sea, by death, desertion, or other unforeseen cause, may be engaged in the manner provided for such cases by the forty-seventh section of the said Mercantile Marine Act, 1850.<sup>a</sup> The master of every foreign-going ship for which such a running agreement as aforesaid is made, shall, upon every return to any port in the United Kingdom before the final termination of the agreement, discharge or engage before the shipping master there any seaman whom he is required by law so to discharge and engage, and shall indorse on the agreement a statement (as the case may be), either that no such discharges or engagements have been made or are intended to be made before the ship again leaves port, or that all such discharges or engagements have been duly made as herein-before required; and any master who wilfully makes a false statement in such indorsement shall be liable to a penalty not exceeding twenty pounds; and the shipping master shall also sign an indorsement on the agreement to the effect that the provisions of this act relating to such agreement have been complied with, and shall redeliver the agreement so indorsed to the master, when signed and attested. In cases in which such running agreements are made, the duplicate agreement retained by the shipping master upon the first engagement of the crew shall either be returned to the registrar of seamen immediately, or be kept by the shipping master until the expiration of the agreement, as the Board of Trade may direct. For the purpose of determining the fees to be paid upon the engagement and discharge of seamen belonging to such ships aforesaid, the crews shall be considered to be engaged when the agreement is first signed, and to be discharged when the agreement finally terminates, and all intermediate engagements and discharges shall be considered to be engagements and discharges of single seamen: provided that nothing therein contained shall affect the power of reducing fees which the Board of Trade possesses under the said Mercantile Marine Act, 1850. Except as therein-before provided, all enactments relating to agreements or to discharges which are contained in the said Act shall apply to agreements and discharges effected in the manner herein-before mentioned." Cn. XXI.

This statute, be it observed, does not make a *verbal agreement* for wages absolutely void. It only imposes penalties on masters for taking seamen out without such a written agreement. Verbal agreement.

By the 16 and 17 Vict. c. 131, s. 39, a contract may be made with Natives of Lascars, or natives of India, binding them to proceed to any port in the *Australian* colonies either as seamen, or as passengers, and *there* to

<sup>a</sup> 14 & 15 Vict. c. 96, s. 9.

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engage themselves as seamen in any ship bound to the U.K., or to any other part of H.M.'s dominions; provided such contract be in such form, contain such provisoes, be executed in such manner, and under such conditions, for securing their return to their own country, and for other purposes, as the Governor-general, or Governor of the Presidency, may direct. If certified by the proper officer of the colony that it is a proper agreement, the Lascar must enter into it, and serve as one of the crew. If he refuse, he is liable to all the consequences, and may be dealt with, in all respects, in the same manner as if he had voluntarily entered into it.

## Seaman.

The word *seaman*, as here used, includes every person employed or engaged to serve in any capacity on board, except the master, and apprentices duly indentured and registered. The master's contract can only be made with the owners, and is not required to be in writing.

A seaman, who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master *when a ship was in distress*, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, was, at a trial before the late Ld. Kenyon, esteemed to be wholly void.<sup>a</sup> So, where two of the crew deserted in the course of a voyage, and the master having in vain attempted to supply their places at C., entered into an agreement with the rest of the crew at that place, to divide among them the wages of the deserters, if he should not be able to procure two other men at G., which, in fact, he could not do, Ld. Ellenborough decided that the engagement was wholly void. It was attempted to distinguish this case from the foregoing, by suggesting that the agreement was made on shore, when the master could not be supposed to be under any restraint or apprehension, and not at sea in a moment of peril like the former case: an obvious answer to this suggestion would be, that if the master had not been apprehensive of further desertion, he would not have made such a promise; but the Ch. Just., in his own manly and dignified manner, decided the case upon the general ground. "There was," said his Lordship, "no consideration for the ulterior pay promised to the mariners, who remained with the ship; before they sailed from L., they had undertaken to do all they could under all the emergencies of the voyage; they had sold all their services till the voyage should be completed." "The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those, who remain, are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port."<sup>b</sup>

Promise of  
extra wages  
when void.

<sup>a</sup> Harris v. Watson, Peake N. P. 72. 527; England v. Davidson, 3 P. & D. 594; Clutterbuck v. Coffin, 4 Sc. N. C. 509.  
<sup>b</sup> Stilck v. Myrick, 2 Camp. 317; see also Thompson v. Havelock, 1 Camp.

## CHAPTER XXII.

## CH. XXII.

## OF THE EARNING AND PAYMENT OF WAGES.

I PROPOSE in the present chapter to consider, 1st, the cases in which the whole wages agreed to be given to seamen are to be paid; 2ndly, the cases in which a part only is to be paid; and, lastly, the time at which the payment is to be made. All that is said in this and the following chapter respecting seamen, is to be understood of all the *officers* in the ship, except the master, and of him also, if the subject is not inapplicable to his situation and character; in short, I now write of every person employed or engaged to serve in any capacity on board, except the master, and apprentices duly indentured and registered.

First, it is obvious, that a seaman, who has faithfully performed his services on board a ship during the whole period of the intended voyage, is entitled to receive the whole of the stipulated reward, if no disaster has rendered his service useless or unproductive to his employer. And as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases, so, on the other hand, the law gives him his whole wages, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage.<sup>a</sup> And if a master, in violation of his contract, discharges a seaman from the ship during a voyage,<sup>b</sup> the seaman will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel. So, if a seaman be discharged after signing the ship's articles, but before the commencement of the voyage, he is entitled to proceed in the Admiralty Court in a suit for wages, the voyage for which he was engaged having been performed. If the voyage be altered or abandoned, his remedy seems by action at law for special damages.<sup>c</sup>

When the whole wages are payable.

When voyage abandoned.

The *Mercantile Marine Act*, 1850 (13 and 14 Vict. c. 93), contains some important provisions, over and above those already given,<sup>d</sup> relating to this matter. It enacts "that a seaman's rights to wages and provisions shall be taken to commence either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens: provided, that this enactment shall not prejudice

<sup>a</sup> Laws of Oleron, art. 6 & 7; of Wisbuy, art. 19; of the Hanse-towns, art. 39 & 45; same, of the year 1614, tit. 14, art. 1; French Ord. liv. 3, tit. 4; art. 11, *Code de Commerce*, art. 262; *Chandler v. Grieves*, 2 H. Bl. 606, n. a.  
<sup>b</sup> The *Exeter*, 2 Rob. A. R. 261; the *Beaver*, 3 Ib. 92; *Roccus*, Not. 43;

Hanseatic Ord. of 1614, tit. 3, art. 7; *Code de Commerce*, art. 252.

<sup>c</sup> The *Blake* 1 Wm. Rob. 75; the *C. of London*, Ib. 88; and see 13 & 14 Vict. c. 93, s. 57; *Wells v. Osmond*, 2 Ld. Raym. 1044, *post*.

<sup>d</sup> *Ante*, p. 262, *post*. 266.

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Compensation when  
discharged  
before voyage,  
&c.

Advance  
notes.

the infliction of any lawful punishment, forfeiture, or fine; nor shall any seaman be entitled to wages for any period during which he refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning work.<sup>a</sup> That any seaman who has signed an agreement, and who is discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him not exceeding one month's wages, and may, on adducing such evidence as the justice hearing the case may deem satisfactory of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned.<sup>b</sup> That so much of the Seaman's Protection Act as relates to advance of wages and advance notes shall be repealed from the time when those parts of this act which relate to the same particulars come into operation, except as to advances made and advance notes given before that time. That no advance note shall be made except in forms sanctioned by the Board of Trade, which are to contain blanks for the number of days within which the notes are to be payable and such other blanks as may be necessary; and no such form shall be altered except by duly filling up the blanks therein; and no advance of wages shall be made or advance note given to any person but the seaman himself; and no advance of wages shall be made or advance note given unless the agreement contains a stipulation for the same and an accurate statement of the amount thereof; and no advance note shall be given to any seaman who signs the agreement before a shipping master, except in the presence of such shipping master, or, except in the case of a substitute, until four hours after the agreement has been so signed. That if any advance of wages is made or any advance note given to any seaman in any such manner as to constitute a breach of any of the above provisions, the wages of such seaman shall be recoverable by him as if no such advance had been made or promised; and in the case of any advance note so given, no person shall be sued thereon unless he was a party to such breach. That whenever any advance note is discounted for any seaman, such seaman shall sign or set his mark to a receipt endorsed on the note, stating the sum actually paid or accounted for to him by the person discounting the same; and such person may, after the expiration of ten days from the final departure of the ship from her last port of departure in the United Kingdom sue for and recover the amount promised by the note, with costs, either from the owner or from any agent who has drawn or authorised the drawing of such note, either in the county court or in the summary manner in which seamen are by the General Merchant Seamen's Act enabled to sue for and recover wages not exceeding twenty pounds; and in any such proceeding it shall be sufficient for such person to prove that the note was given by the owner or by the

<sup>a</sup> s. 56.

<sup>b</sup> s. 57.

master or some other authorised agent, and that the same was discounted to and receipted by the seaman; and the seaman shall be presumed to have gone to sea with the ship, and to have duly earned or to be duly earning his wages, unless the contrary is proved, either by the production of his register-ticket, or by the official statement of the change in the crew caused by his absence made and signed by the master as herein-after required, or in some other manner. That Ch. XXII. all stipulations for the allotment of any part of the wages of a seaman during his absence shall be inserted in the agreement, and shall state the amounts and times of the payments to be made; and all allotment notes shall be in forms sanctioned by the Board of Trade. That no seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom shall be entitled to sue abroad for wages in any court or before any justice, unless he is discharged in the manner required by the General Merchant Seamen's Act, and with the written consent of the master, or proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman by remaining on board; but if any seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which, but for this enactment, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover, in addition to his wages, such compensation, not exceeding twenty pounds, as the court or justice hearing the case may think reasonable.<sup>a</sup> That, except in cases in which seamen expressly require to be paid without waiting for an account, every master shall, not less than twenty-four hours before paying off or discharging any seaman deliver to him, or, if the seaman is to be discharged before a shipping master, to such shipping master, a full account, in form sanctioned by the Board, of his wages, and of all deductions to be made therefrom on any account whatever; and no such deduction (except in the cases above excepted, and also except in respect of any matter happening after such delivery) shall be allowed unless a statement thereof is so made and delivered.<sup>b</sup> That in the case of foreign-going ships all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed hereunder.<sup>c</sup> That the shipping master shall hear and decide any question whatever between a master or owner and any of his crew which both parties agree in writing to submit to him; and every decision so made by him shall be binding on both parties; and shall in any legal proceeding which may be taken in the matter before any court or justice, be deemed to be conclusive as to the rights of the parties; and such written submission, though unstamped, signed by the parties, with an unstamped certificate of the decision signed by the shipping master, shall be sufficient evidence that the same has been duly made. That upon the completion before a shipping master of

Allotment  
of wages.

Compensation when  
master  
guilty of mis-  
conduct on  
his return.

Discharge,  
&c., before  
shipping  
master.

<sup>a</sup> s. 94.

<sup>b</sup> s. 95.

<sup>c</sup> s. 96.

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any discharge and settlement, the master or owner and each seaman shall respectively, in the presence of the shipping master, sign a mutual release of all claims in respect of the past voyage or engagement, in a form to be sanctioned by the Board of Trade, and the shipping master shall also sign and attest it, and shall retain and transmit it as herein-before directed; and such release so signed and attested shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement; and a copy of such release, certified under the hand of such shipping master to be a true copy, shall be given by him to any person who may be a party thereto, and may require the same; and such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy; and in cases in which discharge and settlement before a shipping master is required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim; and upon any payment being made by a master before a shipping master, the shipping master shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned. That every master shall, upon any discharge being effected before a shipping master, make and sign in duplicate, in a form sanctioned by the Board of Trade, a report of the conduct, character, and qualifications of the persons discharged, or may state, in a column to be left for that purpose in the said form, that he declines to give any opinion thereupon; and the shipping master shall retain one copy, and shall transmit the other to the registrar of seamen, or to such other person as the Board may direct, to be recorded, and shall, if desired so to do by any seaman, give to him or endorse on his certificate of discharge a copy of so much of such report as concerns him. That any shipping master may, in any proceeding relating to the wages, claims, or discharge of any seaman hereby directed to be carried on before him, call upon the owner or his agent, or upon the master or any mate or other member of the crew, to produce any log-books, papers, or other documents in their respective possession or power relating to any matter in question in such proceeding, and may call before him and examine any of such persons, being then at or near the place, on any such matter. That any master or owner who, in any case in which discharge or settlement for wages are hereby directed to be made before a shipping master, discharges any seaman or settles with him for his wages otherwise than as herein-before directed, shall for each offence be liable to a penalty not exceeding ten pounds; and any master who fails to deliver such account as herein-before required at the time and in the manner herein-before directed, shall for each offence be liable to a penalty not exceeding five pounds; and every owner, agent, master, mate, or other member of the crew, who, when called upon by the shipping master, does not produce any

such paper or document as herein-before in that behalf mentioned, Ch. XXII. if in his possession or power, or does not appear and give evidence, and does not show some reasonable excuse for such default, shall for each offence be liable to a penalty not exceeding five pounds; and every person who makes or procures to be made or assists in making any false certificate or report of the service, qualifications, conduct, or character of any seaman, knowing the same to be false, or who fraudulently forges or alters, or procures to be forged or altered, or assists in forging or altering, any such certificate or report, or who fraudulently makes use of any certificate or report which is forged or altered or does not belong to him, for each offence shall either be deemed guilty of a misdemeanour, or shall be liable summarily to a penalty not exceeding fifty pounds, or to imprisonment not exceeding three months, with or without hard labour, as the justice or court hearing the case may think fit."

2ndly, It was determined<sup>a</sup> before the passing of any of the statutes <sup>Entry into the R. N.</sup> for regulating the service of seamen in merchant ships, that a seaman, who was impressed from such a ship into the royal service, was entitled to receive a proportion of his wages, up to the time of impressing, the ship having afterwards arrived in safety at her port of discharge. And the 7 and 8 Vict. c. 112, s. 50, expressly provides, that a seaman belonging to any merchant ship, who enters into the service of H. M. on board any of H. M.'s ships, shall not for such entry incur any penalty or forfeiture,<sup>b</sup> nor shall such entry be deemed a desertion: any clause to the contrary inserted in the agreement is *void*.

If a seaman falls sick and dies during the voyage, the laws of <sup>Death of Seamen.</sup> Oleron,<sup>c</sup> of Wisby,<sup>d</sup> and of the Hanse Towns,<sup>e</sup> direct that his wages shall be paid to his heirs, in general words, without distinction as to the terms upon which he was hired; and it is not clear whether the payment thus directed, is to be understood of a sum proportionate to the time of his service, or of the whole sum that would have been earned if he had lived to the end of the voyage. The French Ordinance<sup>f</sup> (of 1681), distinguishes between the case of a hiring by the month, and a hiring for the voyage; and, in the first case, directs the payment of wages up to the day of the death of the seaman; in the last case, it directs the payment of half the stipulated sum, if a seaman dies on the voyage outward, and the whole, if he dies on the voyage homeward. A similar rule had been laid down in the case of a hiring by the voyage, in the Ordinance of the Emperor Charles V.,<sup>g</sup> which regulated the commerce of the Low Countries; and Cleirac and Valin<sup>h</sup> say, that the same rule was established by the Consolato del Mare. There is no general decision on this subject in our law-

<sup>a</sup> *Wiggins v. Ingleton*, 2 Ld. Raym. 1211.

<sup>b</sup> *Anle*, p. 144. The proportionate amount of wages is in this case regulated by 16 & 17 Vict. c. 131, s. 35.

<sup>c</sup> Art. 7.

<sup>d</sup> Art. 19.

<sup>e</sup> Art. 45.

<sup>f</sup> Liv. 3, tit. 4; *Loyers des Matelots*, art. 13 & 14; *Code de Commerce*, art. 265.

<sup>g</sup> Cleirac on the 7th article of the laws of Oleron.

<sup>h</sup> On the French Ordinance, *ubi supra*.



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books;<sup>a</sup> but in the case<sup>b</sup> which I am about to quote, it seems to have been admitted, that the representatives of a seaman hired by the month, would be entitled to a proportion of wages to the time of his death. The facts of the case itself were very particular, and the decision turned upon them. Before the passing of the statute<sup>c</sup> which limited the wages to be given to persons for navigating a ship back from the West Indies to this country, one Cutter was hired as second mate on a voyage from Jamaica to Liverpool; and at J., the master subscribed and delivered to him the following note:—"Ten days after the ship G. P., myself master, arrives at L., I promise to pay to Mr. T. Cutter, the sum of 30 guineas, provided he proceeds, continues, and does his duty as second mate in the said ship, from hence to the port of L. Kingston, July 31, 1793." The ship sailed from Kingston on the 2nd of Aug., and arrived at L. on the 9th of Oct. Cutter went on board the 31st of July, sailed in the ship, and proceeded, continued, and did his duty as second mate until his death, which happened on the 20th of Sept. It was proved that the wages usually paid to a second mate of a ship on such a voyage, if hired by the month, out and home, were 4*l.* per month: that when seamen were shipped by the run from J. to England, a gross sum was usually given; and that the usual length of a voyage from Jamaica to L., was about eight weeks. The executrix of C. brought an action against the master, and it was contended on her behalf, that she ought to recover a proportion of the wages for that part of the voyage that he lived, and served on board the ship. The Court of K. B., before which this question was brought for decision, directed inquiry to be made as to the usage among merchants, &c., in cases of this kind; but no satisfactory information being obtained as to the usage, although such notes had been often given, the court, upon consideration of the particular terms of the note, and of the great excess of the sum to be paid to C., if he had performed the whole voyage according to those terms, above the usual rate of wages upon a monthly hiring, decided that nothing was payable for the partial service: declaring at the same time, that, if the plaintiff could have proved a *usage* to pay a proportional sum in similar cases, their decision should have been conformable to the usage.

Freight the  
mother of  
wages.

The payment of wages is *generally* dependent upon the payment of freight; if the ship has earned its freight, the seamen, who have

<sup>a</sup> Nor does the 5 & 6 Wm. 4, c. 19, settle the question. It seems to apply only to wages *due*. Again, the *ship's articles* would probably receive the same construction as the contract in *Cutter v. Powell*, 2 Smith's L. C. 1, and *Jesse v. Roy*, 1 C. M. & R. 316, if it were not for the 13 & 14 Vict. c. 93, s. 53. But as that declares that a seaman's rights and remedies are not to be in any way affected by the *articles*; and as it declares also that he is not obliged to

produce them in any court of justice, in support of his claims, it seems to follow, that his executor might recover a *quantum meruit*, for a proportionate part of the voyage. Note: The 4 & 5 Wm. 4, c. 52, s. 30, relates to seamen *dying on board*; the 7 & 8 Vict. c. 112, s. 31, to seamen dying abroad, *elsewhere than on board*.

<sup>b</sup> *Cutter v. Powell*, 6 T. R. 320; 2 Smith's, L. C. 1.

<sup>c</sup> 37 Geo. 3, c. 73, s. 3.

served on board the ship, have in like manner earned their wages.<sup>a</sup> CH. XXII.  
 And as, in general, if a ship destined on a voyage out and home has delivered her outward-bound cargo but perishes in the homeward voyage, the freight for the outward voyage is due,<sup>b</sup> so, in the same case,<sup>c</sup> the seamen are entitled to receive their wages for the time employed in the outward voyage and the unloading of the cargo.<sup>d</sup> And if a ship sails to several places, wages are payable to the time of the delivery of the last cargo. Upon the same principle, where money had been advanced to the owners in part of the freight outward, and the ship perished before her arrival at the port of delivery, it was held<sup>e</sup> that the seamen were entitled to wages in proportion to the money advanced. If a charter-party be so framed as to exclude the owners from demanding freight for the carriage of the outward-bound cargo, unless the ship brings back her homeward-bound cargo in safety, such a special agreement, whereby the owners consent to relinquish a benefit, to which they are entitled by the general principles of law, does not affect the seamen, or deprive them of their general right.<sup>f</sup>

When owners are not entitled to freight.

If, after the hiring of seamen, the owners of a ship do not think proper to send her on the intended voyage, the seamen are to be paid for the time during which they may have been employed on board the ship.<sup>g</sup> And if they sustain any special damage by the breaking off the contract, it seems reasonable also that they should recover such damage by an action upon the agreement.<sup>h</sup> The French Ordinance (of 1681) also directs<sup>i</sup> the payment of wages for the time employed in equipping the ship in two other cases, which I do not find mentioned in the more ancient sea-laws; these are, the prohibition of commerce by the government of the country to which the ship belongs, with the country to which it is destined (which must always take place if a war happens between the two countries), and an embargo imposed in the lading port. The latter case does not dissolve the contract between the owners and the merchant by the law either of France or England, as I have already mentioned;<sup>k</sup> yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are therefore not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them.

Effect of embargo, &c.

In the case of shipwreck, it is the duty of the seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo. If the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, the seamen are also entitled

<sup>a</sup> *Ante*, p. 223.

<sup>b</sup> *Ib.*

<sup>c</sup> Anonymous, 1 Ld. Raym. 639, 739; 12 Mod. 408; Ord. of Rotterdam, art. 214; 2 Magena, 113.

<sup>d</sup> See *Armstrong v. Smith*, 1 B. & P. 299.

<sup>e</sup> Anon. 2 Show, 283.

<sup>f</sup> *Buck v. Rawlinson*, 1 Bro. P. C.

102; *Edwards v. Child*, 2 Vern. 727.

<sup>g</sup> *Wells v. Osmond*, 2 Ld. Raym.

1044; see *ante*, pp. 265, 266.

<sup>h</sup> *Ib.*

<sup>i</sup> Liv. 3, tit. 4, *Loyers des Matelots*, art. 4 and 5; *Code de Commerce*, art. 254, 255.

<sup>k</sup> *Ante*, pp. 33, 257.

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Time of  
payment.

When sea-  
men wish to  
go on ano-  
ther voyage.

to a proportion of their wages, and this is expressly directed by the French Ordinance (of 1681).<sup>a</sup> So, although no freight be earned, they are entitled upon the parts saved, as far as they will go, in satisfaction of their wages already earned.<sup>b</sup>

As to the period within which wages are to be made, the 7 and 8 Vict. c. 112, enacts "that the master or owner of every ship shall and is hereby required to pay every seaman his wages within the respective periods following; (that is to say,) if the ship shall be employed in coasting, the wages shall be paid within two days after the termination of the agreement, or at the time when any such seaman shall be discharged, whichever shall first happen; and if the ship shall be employed otherwise than coasting, then the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within seven days after the seaman's discharge, whichever shall first happen; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one fourth part of the balance due to him; and in case the master or owner shall neglect or refuse to make payment in manner aforesaid, he shall for every such neglect or refusal forfeit and pay to the seaman the amount of two days' pay (to be recovered as wages) for each day, not exceeding ten days, during which payment shall, without sufficient cause, be delayed beyond the respective periods aforesaid: provided always, that nothing in this clause contained shall extend to the cases of ships employed in the southern whale fishery, or on voyages for which seamen, by the terms of their agreement, are wholly compensated by shares in the profits of the adventure. That every such payment of wages to a seaman shall be valid and effectual in law, notwithstanding any bill of sale or assignment which may have been made of such wages, or of any attachment or incumbrance thereon, and that no assignment or sale of wages or salvage made prior to the accruing thereof, nor any power of attorney expressed to be irrevocable for the receipt of any such wages or salvage, shall be valid or binding upon the party making the same, and any attachment to be issued from any court whatever shall not prevent the payment of wages to any seaman; and if during the voyage the allowance of provisions which a seaman agreed to receive shall be reduced one third of the quantity, or less, he shall receive fourpence per day, and if the reduction be more than one third he shall receive eightpence per day, during the period such respective deductions may be made, and such pecuniary allowance shall be paid to him in addition to and be recoverable as wages. That if three days after the termination of the stipulated service, or if three days after a seaman shall have been discharged, he shall be desirous of proceeding on another voyage, and in order thereto, or for any other sufficient reason, shall require immediate payment of any amount of wages, *not exceeding twenty pounds*, due to him, it shall be lawful for any justice of the peace, in and for any part of Her Majesty's dominions

<sup>a</sup> Liv. 3, tit. 4; *Loyers des Matelots*, art. 9; *Code de Commerce*, art. 259.

<sup>b</sup> *The Neptune*, 1 Hagg. A. R. 227; *the Reliance*, 2 T. R. 347.

or the territories under the Government of the East India Company, Ch. XXI. where or near to the port or place where such service shall have terminated, or such seaman shall have been discharged, or the party or parties liable shall be or reside, on application from such seaman, and on satisfactory proof that he would be prevented from employment or incur serious loss or inconvenience by delay, to summon such party or parties before him, and if it shall appear to the satisfaction of such justice that there is no reasonable cause for delay, to order payment to be made forthwith, and in default of immediate compliance with such order, such party or parties shall forfeit and pay to such seaman, in addition to his wages, the sum of five pounds. That in all cases of wages, *not exceeding twenty pounds*, which shall be due and payable to any seaman, it shall be lawful for any justice of the peace in and for any part of Her Majesty's dominions or the territories under the government of the East India Company, where or near to the place where the ship shall have ended her voyage, cleared at the Custom-house, or discharged her cargo, or where or near to the place where the party or either of the parties upon whom the claim is made shall be or reside, upon complaint on oath made to such justice by such seaman, or on his behalf, to summon such party or parties to appear before him to answer such complaint; and upon the appearance of such party or parties, or, in default thereof, on due proof of him or them having been so summoned, such justice is hereby empowered to examine the parties and their respective witnesses (if there be any) upon oath, touching the complaint, and the amount of wages due, and to inspect any agreement or copy thereof, if produced, and make such order for payment of the said wages, not exceeding twenty pounds, with the costs incurred by the seaman in prosecuting such claim, as shall to such justices appear reasonable and just; and in case such order shall not be obeyed within two days next after making thereof, it shall be lawful for such justice to issue his warrant to levy the amount of the wages awarded to be due, by distress and sale of the goods and chattels of the party on whom such order for payment shall be made, rendering to such party the overplus (if any shall remain of the produce of the sale), after deducting thereout all the costs, charges, and expenses incurred by the seaman in the making and prosecuting of the complaint, as well as the costs and charges of the distress and levy; or to cause the amount of the said wages, costs, charges, and expenses to be levied on the ship in respect of the service on board which the wages are claimed or on the tackle and apparel thereof; and if such ship shall not be within the jurisdiction of such justice, or such levy cannot be made, or shall prove insufficient, then he is hereby empowered to cause the party to whom the order shall be made to be apprehended, and committed to the common gaol of the district or county, there to remain without bail until payment shall be made of the amount of the wages so awarded, and of all costs and expenses attending the recovery thereof; and the award and decision of such justice as aforesaid shall be final and conclusive. That all the rights, liens, privileges, and remedies (save such remedies as are against a master himself) which by this act,

Summary  
remedy.

Abbott on Shipping. or by any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners, in respect to the recovery of wages due to them from the owner of any ship belonging to any of Her Majesty's subjects; and that no suit or proceeding for the recovery of wages shall, *unless they exceed twenty pounds*, be instituted against the ship, or the master or owner thereof, either in any Court of Admiralty or vice-Admiralty Court, or any Court of Record in Her Majesty's dominions, or the territories under the government of the East India Company, unless the owner of the ship shall be bankrupt or insolvent, or the ship shall be under arrest or sold by the authority of any Admiralty or vice-Admiralty Court, or unless any magistrate acting under authority of this act shall refer the case to be adjudged by any such court or courts, or unless neither the owner nor master shall be or reside at or near the port or place where the service shall have terminated, or where any seaman shall have been discharged or put on shore. That in all cases of wreck or loss of the ship every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned freight; provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo, and stores."

Under 20l. recovery of wages shall, *unless they exceed twenty pounds*, be instituted against the ship, or the master or owner thereof, either in any Court of Admiralty or vice-Admiralty Court, or any Court of Record in Her Majesty's dominions, or the territories under the government of the East India Company, unless the owner of the ship shall be bankrupt or insolvent, or the ship shall be under arrest or sold by the authority of any Admiralty or vice-Admiralty Court, or unless any magistrate acting under authority of this act shall refer the case to be adjudged by any such court or courts, or unless neither the owner nor master shall be or reside at or near the port or place where the service shall have terminated, or where any seaman shall have been discharged or put on shore. That in all cases of wreck or loss of the ship every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned freight; provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo, and stores."

Wages in case of wreck.

## CHAPTER XXII.

## OF THE LOSS AND FORFEITURE OF WAGES.

THE wages of seamen, whether hired by the month or by the voyage, are sometimes forfeited without any fault on their part, and sometimes forfeited by their misconduct.

First, as to the loss of wages. In order to stimulate the zeal and attention of this class of persons, who are often engaged in very perilous services, the policy of all maritime states has made the payment of their wages to depend on the successful termination of the voyage.<sup>a</sup> If, by any disaster happening in the course of the voyage, such as the loss, capture, or disability<sup>b</sup> of the ship, the owners lose their freight, the seamen also lose their wages. If, however, the loss arise from the act of the master or owners, as by

<sup>a</sup> Molloy, b. 2, ch. 3, s. 10, 1 Sid. 179; Abernethy v. Landale, Dougl. 521; French Ord. liv. 3, tit. 4; Code de Commerce, liv. 2, tit. 5; see also the

Neptune, 1 Hagg. A. R. 227; Lady Durham, 3 Ib. 196; The Riby Grove, 2 Th. 239, and ante, p. 223.

<sup>b</sup> Eaken v. Thom, 5 Esp. 6.

illegal trading, to which the seaman is not a party, his right to wages ср. XXII. is not effected.<sup>a</sup> It was mentioned in the preceding chapter that the payment of wages is divisible, and that if a ship has delivered its cargo at one place, the wages are so far due, although the ship be afterwards taken or sunk. But if a ship sail to one place in order to take in a cargo there, to be conveyed to another place, and having received the cargo accordingly, be taken before its arrival at the place of delivery, nothing is payable to the seamen for navigating the ship to the first place, because no freight is thereby gained.<sup>b</sup>

I have mentioned in a former part of this treatise, that in some foreign countries, where ransom is not contrary to law, the seamen belonging to a ship captured and ransomed are bound to contribute a portion of their wages towards the ransom by way of general average. This point is in itself of no importance in this country, because ransom is prohibited by our law; but the payment of salvage upon recapture appears to be analogous to the payment of ransom; and therefore it is proper to mention here, that in an action brought for the wages of a seaman after a capture and ransom of the ship,<sup>c</sup> and which was tried before C. Just. Holt, he is reported to have decided that the seaman was entitled to nothing, he being unable to prove that by the custom of merchants he was entitled *pro rata*, as was insisted on his behalf. On the other hand, in a case,<sup>d</sup> tried before Ld. Eldon, when his Lordship presided in the Court of C. P., a seaman recovered his whole wages, after capture and recapture of the ship. In this case, however, the defendant put his defence on another ground, which he failed to establish, and did not insist that any deduction should be made from the plaintiff's demand for his contribution to the salvage.

In another case, a mariner, who had been hired for a voyage from N. to L. and back, at a certain sum, and was captured on board two days after the ship's departure, and taken out and sent to France, instituted a suit in the Court of Admiralty for wages; the ship had been retaken, carried to the place of destination, and performed her voyage; the owner, however, had been obliged to hire another person at L. to return to N. with the ship, in the place of the claimant. Under these circumstances, Ld. Stowell held, that the claimant was not entitled to anything; but it seems, from the language of the report, that if he had remained on board, his interest would have been thought to have revived upon the recapture.<sup>e</sup> In a case tried before Ld. Kenyon, the master of a vessel, which had been seized and restored, claimed his wages for the period of detention, although during that time he had been separated from her, she having afterwards earned her freight. The wages for the voyage, exclusive of that period, were paid without dispute; and the defendant is reported to have acquiesced under a verdict given against him for the further sum, by reason of a strong opinion expressed by

In the case  
of capture  
and recapture.

<sup>a</sup> The Malta, 2 Hagg. A. R. 158.

<sup>b</sup> Hernaman v. Bawden, 3 Burr. 1844.

<sup>c</sup> Chandler v. Meade, mentioned in Wiggins v. Ingleton, 2 Ld. Raym. 1211.

<sup>d</sup> Bergstrom v. Mills, 3 Esp. N. P. 36.

<sup>e</sup> The Friends, 4 Rob. A. R. 143.

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his Lordship at the trial in favour of the claim.\* The ground of decision in this case was fully discussed and considered, on the occasion of the seizure and detention of several British ships in Russia, by the late Emperor Paul, in the year 1800. I allude to the case of *Beale v. Thompson*, which has been incidentally mentioned before. Beale, an Englishman, was hired to serve as a seaman in a British ship, called the *Aquilon*, whereof Thompson was owner, at monthly wages for a voyage from Hull to Petersburg, and from thence to London; and signed articles in the usual form. The ship went out to P. in ballast to bring a cargo to London; and the freight was to be paid by the ton. On the 5th of Nov., 1800, which was soon after this vessel arrived at P., the Emperor commanded an embargo to be laid on all English ships in the ports of his empire, until a supposed convention relating to the island of Malta should be fulfilled. To enforce this order, guards were stationed along the shore to prevent the crews from quitting their ships. On the 10th of the same month, they were taken from their ships by a Russian guard; such of the seamen as were subjects of other countries were liberated at the request of their consuls; but the British masters and mariners were marched in parties into the interior of the country, and treated as prisoners of war. A convention, hostile to Great Britain, was formed between Russia, Sweden, and Denmark, and an embargo was imposed in this country on the vessels of those nations. Upon the death of Paul, and the succession of the Emperor Alexander, peace was re-established, and the ships that had been detained on both sides were mutually restored. This restitution took place in Russia at the end of May, 1801. Beale, and the rest of the crew, re-embarked on board the *A.*, without entering into any new articles with the master, and returned to London with the ship, which brought her cargo and earned her freight. Thompson, the owner, paid the wages at the rate mentioned in the articles, exclusive of the time of the ship's detention; and Beale brought his action to recover his wages for that time. In support of the claim, it was contended that this conduct of the Russian Government partook more of the nature of an embargo than of a capture, and that, considering it as an embargo, the original contract for wages subsisted, as had been decided in the case of a contract of affreightment; and that the mariner's absence from the ship under these circumstances did not occasion a forfeiture by the operation of those clauses of the articles which provide for the continuance of the seamen on board their ship, because it was involuntary on his part. On the other hand, it was insisted, that this was a case of hostile seizure and temporary capture, which put an end to the original contract, and left the mariner a right proportionate only to the services he had actually performed. And further, that if it were to be considered only as an embargo, yet, as the seaman had not, during the period done of it, any duty on board the ship, or for the benefit of the owners, he was not entitled to any payment; and it was urged, that if the force of the Russian Government furnished an excuse to the mariner on the one

\* *Pratt v. Cuff*, cited in *Thompson v. Rowcroft*, 4 East, 43.

hand, for not performing his contract by continuing on board the ship, so, on the other hand, it ought to exempt the owner from paying for what he had not received. The learned Judges of the Court of C. P. were divided in opinion as to the character to be attributed to these acts of the Russian Government, upon which the determination of the question between the parties was thought principally to depend.<sup>a</sup> The cause was brought before the Court of K. B. by writ of error, and after consideration, the judgment of the Court was delivered by Ld. Ellenborough, in favour of the claim of Beale the mariner. It is impossible to give the full effect of the very learned judgment pronounced by the Ch. Justice in an abstract, nor does the plan of this treatise allow me to transcribe the whole; I must therefore refer the reader, who is desirous of full information, to the report,<sup>b</sup> and content myself with stating, that the Court thought it unnecessary to decide in this case, whether or no the dissolution of contracts for freight and wages is the necessary effect of perfect and complete capture, where the right of the original proprietor is not revested by subsequent recapture, nor recognised as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as a case of hostile seizure, with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the power by which the seizure had been made; and observing that there was no case where property so dealt with had been considered as captured, or the contract for freight or wages dissolved; and holding, therefore, that the plaintiff's claim was not defeated on the supposed ground of a dissolution of a contract. The Court also thought, that the seaman had not in this case forfeited his wages under any of the clauses of the articles, because the language of the articles construed, as it ought to be, with reference to the acts of parliament, imported a departure from the ship by the unauthorised act of the party, and did not apply to a seaman taken out of his ship in the manner in which the plaintiff and the rest of the crew had been in this case; but that if this point were more questionable than it appeared to be, yet that the return of the plaintiff to the ship in the manner stated, did, in the absence of any fresh contract on the subject, import a recognition on the part of the master, that he and the sailors then stood in their original relative situation to each other, under the articles by which that relation was constituted. And upon the whole the Court thought, "in point of law, that the contract of service between the plaintiff and defendant was to be considered as having continued and been in force from the time of executing the articles, up to and at the period of the ship's arrival at her port of discharge, and the final termination of her voyage there; and that the plaintiff was to be considered as entitled to his wages during the same time." It has been observed that Beale the plaintiff, in the

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<sup>a</sup> Beale v. Thompson, 3 B. & P. 405.

<sup>b</sup> Beale v. Thompson, 4 East, 546; confirmed in the House of Lords, 1 Dow. Rep. 229. As to waiver of forfeiture,

see Miller v. Brant, 2 Campb. 590; Train v. Bennett, 3 C. & P. 3; the Cambridge, 2 Hagg. 243.



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case just quoted, was an Englishman ; an action was also brought by a mariner, belonging to another ship, under circumstances the same in all respects except as to his national character, he being a foreigner. In this action also the decision of the Court was the same.<sup>a</sup>

Secondly, as to the *forfeiture* of wages.

## Desertion.

The 7 & 8 Vict. c. 112, ss. 7, 8, and 9,<sup>b</sup> declare " that if any seaman during the time or period specified for his service shall wilfully and without leave absent himself from the ship, or otherwise from his duty, he shall (in all cases not of desertion, or not treated as such by the master,) forfeit out of his wages the amount of two days' pay, and for every twenty-hours of such absence the amount of six days' pay, or, at the option of the master, the amount of such expenses as shall have been necessarily incurred in hiring a substitute ; and in case any seaman while he shall belong to the ship shall without sufficient cause neglect or refuse to perform such his duty as shall be reasonably required of him by the master or other person in command of the ship, he shall be subject to a like forfeiture in respect of every such offence, and of every twenty-four hours continuance thereof ; and in case any such seaman, after the ship's arrival at her port of delivery, and before her cargo shall be discharged, shall quit the ship, without a previous discharge or leave from the master, he shall forfeit one month's pay out of his wages : provided always, that no such forfeiture shall be incurred unless the fact of the seaman's absence, neglect, or refusal shall be duly entered in the ship's log-book, the truth of which entry it shall be incumbent on the owner or master, in all cases of dispute, to substantiate by the evidence of the mate or some other credible witness. That in all cases where the seaman shall have contracted for wages by the voyage or by the run or by the share, and not by the month or other stated period of time, the amount of forfeitures to be incurred by seamen under this act shall be ascertained in manner following : (that is to say,) if the whole time spent in the voyage agreed upon shall exceed one calendar month, the forfeiture of one month's pay expressed in this act shall be accounted and taken to be a forfeiture of a sum of money bearing the same proportion to the whole wages or share as a calendar month shall bear to the whole time spent in the voyage ; and in like manner a forfeiture of six days' pay, or less, shall be accounted and taken to be a forfeiture of a sum bearing the same proportion to the whole wages or share as the six days' or other period shall bear to the whole time spent in the voyage ; and if the whole time spent in the voyage shall not exceed the period for which the pay is to be forfeited, the forfeiture shall be accounted and taken to be a forfeiture of the whole wages or share ; and the master or owner is hereby authorised to deduct the amount of all forfeitures out of the wages or share of any seaman incurring the same. That any seaman or other person who shall desert the ship to which he shall belong shall forfeit to the owner thereof all his clothes and effects which he may leave on board, and he shall also forfeit all wages and emoluments to which he might otherwise be entitled ;

<sup>a</sup> Johnson v. Broderick, 4 East, 566.

recoverable by master, 13 & 14 Vict. c.

<sup>b</sup> Wages forfeited for desertion are

93, s. 73.

and in case of any seaman deserting abroad he shall likewise forfeit Ch. XXII. all wages and emoluments whatever which shall be or become due or be agreed to be paid to him from or by the owner or master of any other ship in the service whereof such seaman may have engaged for the voyage back to the United Kingdom; and that all wages and portions of wages and emoluments which shall in any case whatever become forfeited for desertion shall be applied, in the first instance, in or towards the reimbursement of the expenses occasioned by such desertion to the owner or master of the ship from which the seaman shall have deserted, and the remainder shall be paid to the Seamen's Hospital Society; and the master shall, in case of desertion in the United Kingdom, deliver up the register ticket of such seaman or other person to the collector or comptroller of the customs at the port; provided always, that every desertion be entered in the log-book at the time, and certified by the signatures of the master and the mate, or the master and one other credible witness; and that the absence of a seaman from his ship for any time within twenty-four hours immediately preceding the sailing of the ship from any port, whether before the commencement or during the progress of any voyage, wilfully and knowingly, without permission, or the wilful absence of a seaman from his ship at or for any time without permission, and under circumstances showing an intention to abandon the same, and not return thereto, shall be deemed a desertion of and from the said ship; and in case any seaman shall desert in parts beyond the seas, and the master of the ship shall engage a substitute at a higher rate of wages than that stipulated in the agreement to be paid to the seaman so deserting, the owner or master of the ship shall be entitled to recover from the deserter, by summary proceeding, in the same manner as penalties are by this act made recoverable (so far as the same can be applied), any excess of wages or portion thereof which such owner or master shall pay to such substitute beyond the amount which would have been payable to the deserter in case he had duly performed his service pursuant to his agreement: provided always, that no seaman shall be imprisoned longer than three calendar months for non-payment of any such excess of wages."

The 13 & 14 Vict. c. 93, ss. 78, 79, 80, and 81, enacts "that Other of- any seaman or apprentice who whilst on service commits any of fences. the following offences, and who then is or afterwards arrives or is found at any place in which there is a court of justice capable of exercising summary jurisdiction under this act, may, on due proof of the offence, and of such entry thereof in the log-book as herein-after directed, be summarily punished by imprisonment, with or without hard labour, not exceeding in duration the several periods following: (that is to say,)—1, Twelve weeks for wilfully damaging the ship, or embezzling or wilfully damaging any of her stores or cargo: 2, Twelve weeks for assaulting any master or mate: 3, Four weeks for wilful disobedience to any lawful command: 4, Twelve weeks for continued wilful disobedience to lawful commands, or for continued wilful neglect of duty: 5, Twelve weeks for combining with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the

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progress of the voyage: provided always, that nothing hereinbefore contained shall take away or abridge any powers which a master has over his crew. That whenever any act of misconduct is committed which is by the agreement subject to a fine, the appropriate fine shall, if an entry of the offence is made and attested in the official log-book as hereinafter directed, and if the offence is proved to the satisfaction of the shipping master to whom the fine is to be paid, be deducted from the wages of the offender; and the master or owner shall pay over every fine so deducted as follows; that is to say, in the case of foreign-going ships to the shipping master before whom the crew is discharged, and in the case of home trade ships to the shipping master at or nearest to the place at which the crew is discharged; and any master or owner who neglects or refuses to pay over any such fine as aforesaid shall for each offence be liable to a penalty not exceeding six times the amount of the fine retained by him: provided always, that if, before the final discharge of the crew in the United Kingdom, any such offender as aforesaid enters into any of Her Majesty's ships, or is discharged abroad, the offence shall then be proved to the satisfaction of the officer in command of the ship into which he so enters, or of the consular officer, officer of customs, or other person by whose sanction he is so discharged; and the fine shall thereupon be deducted as aforesaid; and an entry of such deduction shall then be made in the official log-book, and signed by such officer or other person; and such fine shall, on the return of the ship to the United Kingdom, in the case of 'foreign-going ships,' be paid to the shipping master before whom the crew is discharged, and in the case of 'home trade ships' to the shipping master at or nearest to the place at which the crew is discharged. That whenever in any proceeding under the General Merchant Seamen's Act or this act any question arises concerning any offence committed by a 'seaman' or apprentice which is punishable under either of such acts, the court or justice hearing the same may, if the justice of the case requires, order the offender to be punished, both by lawful imprisonment appropriate to the case, and, in addition, may make such order in regard of wages accruing due in the meantime as to such court or justice may seem fit. That no 'seaman' or apprentice shall be entitled to any pecuniary allowance, on account of any reduction in the quantity of provisions furnished to him during such time as he wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct either on board or on shore, or during such time as such quantity may be reduced in accordance with any regulation for reduction by way of punishment contained in the agreement."

Drunken-  
ness, &c.

The Legislature also punished with the forfeiture of wages the offence of neglecting or refusing to assist the master in defending the ship against the attack of pirates.<sup>a</sup> Neglect of duty, disobedience of orders, *habitual* drunkenness, or any cause which will justify a master in discharging a seaman during the voyage, will also deprive

<sup>a</sup> 22 & 23 Car. 2, c. 11, s. 7.

the seaman of his wages;<sup>a</sup> but it would seem to be so only where Ch.XXIII. the misconduct is such as to render the discharge of the seaman imperatively necessary for the safety of the ship and the due preservation of discipline.<sup>b</sup> And in the consideration of the question, a broad line is drawn between disobedience of orders and the like in port and on the high seas.<sup>b</sup> A master may likewise forfeit his wages; but a mere error of judgment, unaccompanied by corrupt intention or wilful disobedience of orders, will not *per se* have such an effect.<sup>c</sup> When misconduct is set up by the owners, the Admiralty Court has no power to mitigate the penalty; it must pronounce for or against the whole claim.<sup>c</sup> If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants, deduct the value thereof from the wages of the seamen, by whose misconduct the injury has taken place.<sup>d</sup> And the last proviso introduced into the usual agreement<sup>e</sup> signed by the seamen, is calculated to enforce this rule in the case of embezzlement either of the cargo, or of the ship's stores. This proviso, however, is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew.<sup>f</sup> Nor, as it seems, is any innocent person liable to contribute a portion of his wages to make good the loss occasioned by the misconduct of others.<sup>g</sup>

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## CHAPTER XXIII.

### PROCEEDINGS TO OBTAIN THE PAYMENT OF WAGES.

HAVING, in the three preceding chapters, considered the contract for service on board a merchant ship, the cases in which the remuneration of such service is due either wholly or in part, and those in which it is lost or forfeited, I propose in this last chapter to treat of the means of obtaining this remuneration by legal process.

According to the observation made in a former part of this treatise, the jurisdiction of the courts of common law can in this case be exercised only by suit against the *person*; but the jurisdiction of the Court of Admiralty may be exercised by process against the *ship*. In this Court alone, therefore, that principle of the maritime law which holds the ship *in specie* to be subject to the claim of wages earned by service in it, can be carried into effect. In all claims for wages this Court has power to decree a *sale* of the vessel proceeded against, unless the demand of the successful suitor

<sup>a</sup> See the judgment pronounced by Sir William Scott, in the case of *Robinet v. the ship Exeter*, 2 Rob. A. R. 261; the *Gondolier*, 3 Hagg. 190.

<sup>b</sup> *The Blake*, 1 Wm. Rob. 75.

<sup>c</sup> *The Thomas Worthington*, 3 Wm. Rob. 128.

<sup>d</sup> See 16 & 17 Vict. c. 93, s. 78; *Molloy*, b. 2, ch. 3, s. 9; 2 Show. 167; 1 Ld. Raym. 650; *Duchess of Kent*, 1 Thom. 183.

<sup>e</sup> 5 & 6 Wm. 4, c. 19.

<sup>f</sup> *Thompson v. Collins*, 1 N. R. 347.

<sup>g</sup> *Ib.*; *Duchess of Kent*, *supra*.

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be satisfied.<sup>a</sup> The Court was originally constituted for the adjudication of causes and disputes arising upon the high sea and within the jurisdiction of the Ld. High Admiral, whose deputy the judge of that Court formerly was. The proceedings therein, being according to the course of the civil law, appear to have been very unpopular in ancient times; and two statutes were made in the reign of K. Rich. II., upon the complaint of the Commons of England, to define the limits of its jurisdiction: by the first<sup>b</sup> of which it is "accorded and assented, that the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince King Edward, grandfather of our Lord the King that now is:" by the other,<sup>c</sup> "It is declared, ordained, and established, that of all manner of contracts, pleas, and quarrels, and all other things, arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the admiral's court shall have no manner of cognisance, power, nor jurisdiction." But by a recent statute the jurisdiction of the Court has been extended. Considering these statutes with reference to the present subject, it is evident, that if the seaman's claim to wages be in reality founded on the performance of his service in the navigation of a ship on the high sea, the Court of Admiralty must have cognisance of the claim; and, on the other hand, that if the claim be in reality founded on the contract made for performance of such service, and such contract be, as it usually is, made on shore (or in a port or river), within the body of a county, the Court of Admiralty can have no cognisance of it. In this view of the subject, it is difficult to distinguish the case of the master from that of the persons employed under his command; the nature and the place of the service and the nature of the hiring are in both cases usually the same. The seamen have now, in ordinary cases, a three-fold remedy—against the ship, proceeds of the ship, or freight<sup>d</sup> (the claim amounting to 20*l.*<sup>e</sup>), against the owners, and against the master. The master, whether appointed to that office at the commencement,<sup>f</sup> or succeeding to it in the course<sup>g</sup> of the voyage, could only sue the owners personally in a court of common law, before the 7 & 8 Vict. c. 112, s. 16, extended to him the same lien and remedy for wages as the seaman has.<sup>h</sup> But as he generally received the freight and earnings of the ship, and might pay himself out of the money in his hands, he had not often occasion for the aid of a court of justice to obtain his right. The clear result of the several decisions<sup>i</sup> upon this subject

<sup>a</sup> The *Fremont*, 1 Wm. Rob. 164.

<sup>b</sup> 13 Rich. 2, st. 1, c. 5.

<sup>c</sup> 15 Rich. 2, c. 3.

<sup>d</sup> Ld. Cochrane, 1 Th. 285; the *Westmorland*, 1b. 20. He has no lien on the cargo. *Lady Durham*, 3 Hagg. 196; *The Riby Grove*, 2 Th. 208.

<sup>e</sup> *The King William*, 1 Wm. Rob. 231.

<sup>f</sup> *Ragg v. King*, 2 Stra. 858; *Clay v. Sudgrave*, Salk. 33.

<sup>g</sup> *Read v. Chapman*, 2 Stra. 937; the *Favourite*, 2 Rob. A. R. 232.

<sup>h</sup> As to the construction of the act, see the *Princess Royal*, 2 Wm. Rob. 373; the *Repulse*, 1b. 399. He may sue on the stat. though joint mortgagee of the ship, 1b.

<sup>i</sup> As to the seamen, after sentence, *Winch*, 8; before sentence, *Alleson v. Marsh*, 2 Vent. 181; *Bens v. Parre*, 2 Ld. Raym. 1206; *Ragg v. King*, 2 Stra. 858; *Wheeler v. Thomson*, 1 Stra. 707; *Sayer*, 136; *Bayley v. Grant*, 1 Ld. Raym. 632; *Read v. Chapman*, 2 Stra. 937.

is, that if the hiring be on the usual terms, and made by word, or CN. XXIII. by writing only without seal, the seamen, or any one or more of them, and every officer, including the master, may sue in the Court of Admiralty, and may by the process of that Court arrest the ship as a security for their demand, or cite the master or owners personally to answer to them.

And the seamen may sue there not only for the wages earned in the course of a voyage, but for those earned in rigging and fitting out a ship for a voyage, on which they have engaged to proceed, if the owners do not afterwards think proper to send the ship on the intended voyage.<sup>a</sup> And it seems also that they may sue there for the wages contracted to be paid to them for navigating a ship from one port of this country to another.<sup>b</sup> And if a suit be there instituted, that Court can properly decide whether a place at which a ship may have arrived be a port of delivery so as to entitle them to wages.<sup>c</sup> In regard to foreign seamen, the Court of Admiralty has been in the habit of entertaining proceedings against ships in the ports of this country, at their suit for wages as due by the general maritime law, with the consent of the accredited agent of the Government of their country. Be it observed, the Court has the right to interfere in such a case, without any such consent, but it will not entertain the suit if notice of the intended proceeding be not given in the first instance.<sup>d</sup> The claim must be first tried by the law of the country to which the ship belongs.<sup>e</sup>

I have said that seamen may sue in the Court of Admiralty, if the contract is made on the usual terms, and not by deed. It was decided in two causes, before the passing of the earliest statute requiring the contract to be in writing, that the Court of Admiralty had jurisdiction in the case of a written contract.<sup>f</sup> And the recent statute contains a clause "that no seaman, by entering into or signing such agreement, shall forfeit his lien upon the ship, nor be deprived of any remedy for wages, &c. either against the ship, the master, or the owners thereof." The Court of Admiralty is not authorised to entertain a suit for wages under 20l. (7 & 8 Vict. c. 93), unless it is apparent, under the circumstances, that justice could not be effectually administered by process before a magistrate.<sup>g</sup> Where there is a special agreement differing from the ordinary contract of wages, the Admiralty Court has no power to adjudicate.<sup>h</sup> But in a recent case, *Dr. Lushington* separated the agreement into parts, and took cognisance of that portion which related to wages, and rejected that which referred to the cabin stores.<sup>i</sup> The contract, whatever be its form or nature, always remains in the possession of the master or owners. The statutes

<sup>a</sup> *Wells v. Osman*, 2 Ld. Raym. 1044; 6 Mod. 238; see also *Mills v. Gregory*, Sayer, 127; the *Blake*, 1 Wm. Rob. 75; the *C. of L.* 1b. 88.

<sup>b</sup> *Anon.* 1 Vent. 343. The application for a prohibition was after sentence; see 31 Geo. 3, c. 39, s. 6.

<sup>c</sup> *Brown v. Benn*, 2 Ld. Raym. 1247.

<sup>d</sup> *The Galubchück*, 1 Wm. Rob. 143.

<sup>e</sup> *The John Frederick*, 1 Wm. Rob. 37.

<sup>f</sup> *Bens v. Parre*, 2 Ld. Raym. 1206, and the *Mariner's Case*, 8 Mod. 379.

<sup>g</sup> *The K. William*, 2 Wm. Rob. 231.

<sup>h</sup> *The Maria*, 1 Wm. Rob. 14; *The Riby Grove*, 2 lb. 64; the *Debreasia*, 3 lb. 33.

<sup>i</sup> *The Tecumseh*, 3 Wm. Rob. 149.

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expressly ordain that where it becomes necessary to produce the contract in Court, no obligation shall lie on the seamen to produce it, and that no seaman shall fail in any suit or process for the recovery of wages, for want of the production of it.<sup>a</sup> In the common form of proceeding in the Court of Admiralty, the party who sues for wages does not state how the contract was made; the foundation of the suit in that Court is the service, and not the hiring; and therefore, the objection that the hiring was upon special terms, or was made by deed, does not appear upon the face of the complainants' proceedings, but must be made by the defendants, if they wish to rely on it. And they must make their objection and apply to one of the Courts at Westminster Hall for a prohibition, before sentence is given in the Court of Admiralty: if they suffer the cause to proceed to a judgment upon the merits in that Court, they cannot afterwards avail themselves of this objection.<sup>b</sup> If the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a seaman to his wages; his right to them must depend upon the performance of the stipulated terms. The construction of the instrument in which those terms are contained, is a proper subject for the jurisdiction of the courts of common law; and it is clear by the several authorities on this subject, notwithstanding a seeming dictum in one case,<sup>c</sup> to the contrary, that upon the suggestion of such a contract made at land and under seal, supported by the proper affidavits, the Courts at Westminster Hall will prohibit the Court of Admiralty from proceeding in a suit instituted there. But it is not quite clear whether the defendants ought, before they apply for a prohibition, to plead the agreement in the Court of Admiralty as a bar to the jurisdiction of that Court. In one of the cases on this subject, the Court of K. B. is reported to have said, "If there is any special contract, as is now suggested, the defendant may plead it in the Court of Admiralty, and if that Court does not allow the plea, then it may be a proper time to move the K. B. for a prohibition; for if it should be granted before the plea is disallowed, it is a prejudging of the justice of that Court."<sup>d</sup> The course of the proceedings that had taken place in the Court of Admiralty does not appear by the report of any of the cases in which a prohibition has been granted. The best reporter of the first of these cases<sup>e</sup> says only, "A motion was made for a prohibition to the Court of Admiralty in a suit there for mariners' wages, upon a suggestion of a contract made for them at land; and the Court held, that for the convenience of seamen the Admiralty had been allowed to hold plea for mariners' wages, but yet with this limitation, that if there be any special agreement,

<sup>a</sup> 13 & 14 Vict. c. 93, s. 52.

<sup>b</sup> *Buggin v. Bennett*, 4 Burr. 2085. If a party who has pleaded a modus to a suit in the Spiritual Court for tithes suffer the modus to be tried in that Court, he cannot obtain a prohibition after sentence. *Full v. Hutchins*, Cowp. 422; *vide Ex parte Evans*, 2 Dowl.

N. C. 729; *Hart v. Marsh*, 5 Ad. & E. 591, and cases cited.

<sup>c</sup> *Bens v. Parre*, 2 Ld. Raym. 1206; *Sidney Cove*, 2 Dods, 12; *The Riby Grove*, 2 Thorn. 207.

<sup>d</sup> *The Mariner's Case*, 8 Mod. 379; *the Maria*, 1 Wm. Rob. 141.

*Opy v. Child*, Salk. 31.

by which the mariners are to receive their wages in any other CH. XXIII.  
manner than is usual, or if the agreement be under seal, so as to be  
more than a parol agreement, in such a case a prohibition shall be  
granted; and so it was granted in this case."<sup>a</sup> In the second case,<sup>b</sup>  
by the suggestion<sup>c</sup> made in support of the motion for a prohi-  
bition, the defendant in the Court of Admiralty, after reciting the  
statutes relating to the jurisdiction of the Court of Admiralty, and  
the libel exhibited in that Court by the seamen (by which it ap-  
peared that they had during the voyage entered on board one of  
H. M.'s ships) set forth the contract which contained an express  
covenant, that if any or either of the seamen should depart from or  
leave the ship during the voyage, to go on board any of H. M.'s ship  
or ships of war during the voyage, or upon any other pretence or  
account whatsoever, without leave of the master, such seaman so  
deserting or leaving the ship should forfeit and lose all his wages  
and pay then due and owing; and averred that this contract was  
made on land in this country, and sealed and delivered by the  
parties; and that, although he had offered to prove the said statutes  
and the rest of the premises in the Court of Admiralty before the  
Judge there, yet that the Judge of the said Court had altogether  
refused to receive the said plea and allegation. Upon the motion  
for a prohibition, the Ch. J. Ld. Hardwicke said, that before the  
making of the 2 Geo. 2, c. 36, he always understood the law to be  
settled, that as the Admiralty Court proceeds in suits for mariners'  
wages upon contracts made at land, which cannot be the proper  
cognisance of the maritime jurisdiction, merely by indulgence, a  
prohibition would always be granted where the contract differed  
from the common and usual contracts between masters of ships and  
seamen about wages, by reason of some special terms contained in  
it; and that in this agreement there seemed to be some special  
covenants, as for example one, that if the mariners should enter  
into any of H. M.'s ships of war, they should forfeit their wages;  
which was directly contrary to a clause in the late act. And, 2,  
that where the agreement was by writing signed and sealed, there  
also a prohibition should go, which was likewise the present case.  
And the only question therefore remaining was, whether or no  
the statute reached to this case. And his Lordship gave his  
opinion that it did not; since, as this was a *contract by deed*, it *was*  
*dehors the act, which only required a contract in writing*; and it  
could not be supposed that the act intended to give the Court of  
Admiralty the cognisance of agreements for mariners' wages made  
by deed; that must depend upon the trial of the validity of such  
deed, which could not be otherwise than by a jury at common law,  
being left as it was before; that this case came within the case of  
*Opy v. Addison*, and as the statute did not take it out of the old  
rule, it must still go by that rule. The other Judges concurred in  
the same opinion; and a prohibition was granted. The report of

<sup>a</sup> *Ante*, p. 260.

<sup>b</sup> *Day v. Serle*, 2 Stra. 968, more fully  
by Barnardiston, vol. ii. p. 419; but the  
account in the text of the judgment pro-

nounced by Ld. Hardwicke is taken  
from a manuscript note.

<sup>c</sup> MS. It is signed by Draper.



*Abbott on  
Shipping.*

the last case on this subject, which was a suit instituted in the Court of Admiralty by seamen employed on board a ship in the service of the E. I. Company, is given at considerable length, and although the particulars of the deed, under which the seamen were hired, are not stated, it may be collected from the report that the deed contained a clause, by which it was stipulated, that the seamen should not be entitled to wages, unless the ship should return home; but it does not appear whether this event had taken place or no. The Court granted a prohibition upon the authority of the two former cases, and *Ld. Mansfield* took notice that the seal was not the only circumstance in which this case differed from the ordinary contract for mariners' wages.<sup>a</sup>

From this view of the decisions of the Courts at Westminster Hall, it appears that a prohibition has not in any instance been actually granted where a contract was upon the ordinary terms, merely because it was made by deed; but that in each of the cases the Court considered that circumstance alone to be a sufficient ground for a prohibition. For which the reason seems to be, that as the suit of the seamen in the Court of Admiralty was at first allowed only as a matter of indulgence, and considered as an excepted case not properly belonging to the jurisdiction of that Court, the exception was confined to the case of ordinary contracts not made under seal. For if a contract under seal contain such clauses and covenants only as are conformable to the general rules which govern the administration of justice in the Court of Admiralty, neither the actual existence nor the legal effect and import of the deed can become the subject of litigation in that Court. The seamen are not bound to make the deed the foundation of their claim, either by the general course of proceedings in the Court of Admiralty, or by the statute; and as it can never be their interest to deny the existence or execution of a deed pleaded by the defendant, containing only the usual terms, upon which their claim would rest, if such a deed did not exist, the objection to the mode of trial pursued in that Court, and to the necessity of two witnesses to prove the execution of a deed, can hardly arise. In a case relating to the jurisdiction of the Court of Admiralty on a deed of hypothecation of a ship by the master, which came before the Court of K. B. a few years ago, one of the learned Judges of that Court<sup>b</sup> said, "If the Court of Admiralty has jurisdiction over the subject-matter, the circumstance of the instrument being under seal does not deprive them of their jurisdiction."<sup>c</sup> In a case where the defendants in the Court of Admiralty pleaded a deed, by the terms whereof the mariners agreed to subject themselves to the loss of their wages on particular circumstances, and the plaintiff replied that the deed was obtained by fraud and circumvention, and the Court of Admiralty declared it to have been so, and gave sentence for the plaintiff to

<sup>a</sup> *Howe v. Nappier*, 4 Burr. 1944. The records of suggestions for prohibitions are in general very regularly kept at the office of the Clerk of the Papers, but the particular suggestion in this case

could not be found, although a very diligent search was made by the officer.

<sup>b</sup> *Mr. J. Buller*, 3 T. R. 170.

<sup>c</sup> *Menetone v. Gibbons*, 3 T. R. 267.

recover his wages, the Court of K. B., upon application for a prohibition, said, "This is only a deed on one side to forfeit the wages upon particular circumstances, but will not enable them to sue for their wages at law; the deed, therefore, comes in only by way of incident, and then they may proceed to try it. There can be no prohibition."<sup>a</sup>

In proceeding against the ship *in specie*, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges,<sup>b</sup> for the same reason that the last bottomry bond is preferred to those of an earlier date: the labour of the seamen having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had. The mariner's contract covers the whole ship, one part as well as another with his lien; a part separated by a storm, for instance, when recovered, is still a part of the primary pledge.<sup>c</sup>

But all suits and actions brought in the Court of Admiralty for seamen's wages must be commenced within six years next after the cause of such suit or action shall accrue, unless the party entitled to sue shall at that time be within the age of twenty-one years, a *feme covert*, *non compos mentis*, or imprisoned, or unless such party, or the party sued, shall be at that time beyond the seas; in which cases the suit may be brought within six years after the party suing shall be of full age, discover, of sane memory, or at large; or either the party suing, or the party sued, shall return from beyond the sea.<sup>d</sup>

In the courts of common law the seamen may sue either the master, as the person immediately contracting with them and answerable to them, or the owners, as the persons virtually contracting with them through the agency of the master, and answerable for the performance of his engagement. And actions in the courts of common law are also limited to the same period of six years, with the same provisos,<sup>e</sup> unless they are founded on a contract *under seal*; if they are founded on such a contract, the statutable limitation of twenty years applies to them. In suits in the courts of common law, the declaration may be framed in the ship's articles, or it may be in the common *indebitatus* form for work and labour. The general form is best. If the contract be *under seal*, it must, I conceive, be declared upon. The course of pleading to be adopted by the defendants will depend a good deal on the form of the declaration, of which the consideration does not properly belong to a treatise on a single branch of the law.

Besides these remedies in the superior courts, the Legislature has provided in some cases a *summary* process. The sections of the 7 & 8 Vict. c. 112, relating to this, will be found in a former page.

<sup>a</sup> Buck v. Atwood, 2 Stra. 761.

<sup>b</sup> The Favourite, De Jersey, 2 Rob. A. R. 232; French Ordinance, liv. 1, tit. 14; de la Saisie des Vaisseaux, art. 16, and Valin thereon.

<sup>c</sup> The Neptune, 1 Hagg. 227; the Reliance, 2 Wm. Rob. 123.

<sup>d</sup> 4 Anne, c. 16, ss. 17, 18, & 19. The

length of time thus allowed may be very inconvenient in the case of a suit against the ship, if the property thereof has been changed. The *Code de Commerce*, art. 433, allows only one year.

<sup>e</sup> 21 Jas. 1, c. 16, ss. 3 & 7; and 4 Anne, c. 16, s. 19.

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